Office-Supreme Court, U.S.
FILED
APR 7 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-5466

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EDWARD G. WELSH,

PETITIONER,

v.

STATE OF WISCONSIN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED
SEPTEMBER 27, 1982

CERTIORARI GRANTED FEBRUARY 22, 1983

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

April 24, 1978 - Citation E 49170 issued by Madison police to Edward G. Welsh.

April 24, 1978 - Madison police report refusal to submit to chemical test for alcohol.

April 26, 1978 - Notice of Intention to Suspend Operating Privilege.

May 4, 1978 - Defendant requests hearing on reasonableness of refusal to take chemical test.

February 25, 1980 - New Criminal Complaint and Summons issued and served on Edward G. Welsh.

March 7, 1980 - Minute Sheet noting initial appearances.

March 7, 1980 - Defendant signs recognizance bond in lieu of $284 bail.

March 13, 1980 - Defendant's notice

of motion and motion to dismiss complaint filed.

July 14, 1980 - Evidentiary hearing on defendant's motions before Judge Mark A. Frankel in Dane County Circuit Court.

July 31, 1980 - Notice of a hearing on reasonableness of failure to submit to chemical test served.

September 5, 1980 - Hearing on defendant's claim that refusal to take chemical test was reasonable.

September 5, 1980 - Minute Sheet reporting disposition of proceedings at hearing.

September 15, 1980 - Defendant files motion to appeal to Court of Appeals, District IV.

May 26, 1981 - Decision and opinion of Court of Appeals, District IV, Wisconsin.

October 19, 1981 - Petition for

Review of Court of Appeals decision granted by the Wisconsin Supreme Court.

July 2, 1982 - Decision of the Wisconsin Supreme Court in State v. Welsh.

August 2, 1982 - Remittitur of the Wisconsin Supreme Court.

STATE OF WISCONSIN CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. CRIMINAL COMPLAINT AND SUMMONS

EDWARD G. WELSH, DOB 9/2/33
7158 Tree Lane
Madison, Wisconsin,

Case No. 80CT0243

Defendant.

James Joachim, being first duly sworn, on oath says that on April 24, 1978, at the City of Madison, in said County, the defendant did: unlawfully and intentionally operate a motor vehicle while under the influence of an intoxicant; contrary to Section 346.63(1)(a) of the Wisconsin Statutes; and upon conviction may be imprisoned not less than five days, nor more than one year, and in addition may be fined not more than $500.00; contrary to Sec. 346.63(1)(a), Wisconsin Statutes, and

prays that said defendant be dealt with according to law; and that the basis for the complainant's charge of such offense is:

*1) FACTS: On April 24, 1978, at approximately 8:49 p.m. Madison Police Officer Daley was dispatched to the area of Westfield Place and Mineral Point Road, City of Madison, Dane County, Wisconsin, with reference to a vehicle driving on the cemetery. Upon arrival at said location, Daley states that he contacted Randy Jablonic, who stated that he was driving on Mineral Point Road when he observed a vehicle proceeding inbound on Mineral Point Road almost strike another on-coming vehicle, and then continue to cross the median cement divider and go onto the Sunset Memorial Gardens Cemetery grounds for approximately 150 feet. Jablonic stated that he observed the

driver of that vehicle, later identified as Edward G. Welsh, exit the vehicle and stumble as if he was intoxicated. Jablonic stated that Welsh asked him if he would not call the police, and Welsh then left the cemetery and staggered off in a northeasterly direction towards Tree Lane. Jablonic described Welsh as being a white male about 40 years old, 5'8" tall, and stated that Welsh was wearing a tan leather coat and light pants. Jablonic also stated that the vehicle Welsh was driving was a 1974 Buick with Wisconsin license number YE1289. Daley states that he ran the above information through the Department of Motor Vehicles which indicated that the above vehicle was registered to the defendant, and that the defendant's address was 7158 Tree Lane. Daley stated that he then proceeded to that location

where he contacted the defendant's wife, Patricia Welsh, who stated that her husband, Edward Welsh, just minutes earlier, stumbled into the house, highly intoxicated, and that he just went straight to bed. Daley stated that he then contacted the defendant, who fit the general description previously given, and was wearing clothing that matched the description which was supplied by Jablonic. Daley stated that the defendant was then arrested for operating a motor vehicle while under the influence of an intoxicant and issued a citation for the same. (A copy of the citation is incorporated in this complaint.)

**2) AND THAT THIS COMPLAINT IS BASED ON: Information and belief of your complainant, an Officer with the Madison Police Department, who has read the reports of Officer Daley, whom your

complainant believes to be truthful and reliable based upon past professional contacts and whose reports have always proven to be truthful and reliable. Your complainant further believes the statements of Randy Jablonic to be truthful and reliable in that he is a citizen informant and eye witness to the above offense. Your complainant further believes the statement of Patricia Welsh to be truthful and reliable in that she is a citizen informant. [Oath deleted in this printing]

STATE OF WISCONSIN
DANE COUNTY

CIRCUIT COURT
BRANCH 12

STATE OF WISCONSIN,

Plaintiff,

Case No. 80CT0243

vs.

Evidentiary Hearing

EDWARD G. WELCH,

Defendant.

DATE: July 14, 1980

BEFORE: The Honorable MARK A. FRANKEL, Circuit Court Branch 12 Presiding Judge

APPEARANCES: JOHN STEWART, Assistant District Attorney for Dane County, appeared on behalf of the State of Wisconsin.

The Defendant appeared in person, and by ARCHIE SIMONSON, Attorney at Law.

PROCEEDINGS: Excerpt of Proceedings held in the Evidentiary Hearing.

. . .

PATRICIA WELCH,

having been called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SIMONSON:

. . .

[R.13:3]

Q Now, you had two daughters of a previous marriage, did you not?

A Yes.

Q What are their names?

A Lesa and Laurie Johnson (phonetic spellings).

Q We are talking about an incident in April 24 of 1978. Do you remember that date?

A Roughly.

Q That evening.

A Vaguely.

Q Vaguely, all right. At that time how old was Lesa? What was her birthdate?

[R. 13-4]

A 5/10/61.

Q And how about Laurie?

A 3-28-62.

Q So one of them was 16--well, one--yah, one was 16.

A They were both 16 then.

Q Yes, I guess that is right. They are both 16 years of age at that time. Were your daughters present that evening with you?

A Yes.

[R.13:50]

Q Now, these--at the time the officers came to the door that evening, these are the two girls that answered the door?

A Yes.

Q You were upstairs at the time?

A Yes.

Q You did not leave the officers in, did you?

A No.

Q The first time you encountered the officers you were upstairs?

A Yes.

Q So, you don't know what transpired at the door?

A No, I don't.

Q And what you do know is what has been related to you by your daughters?

A Yes.

. . . [R.13:6]

Q And now neither one of them are available for testimony?

A Right.

Q You and your daughter, Laurie, prepared for the hearing in my office, by giving me statements as to what transpired at the door of the residence?

A Yes.

Q On the evening of--and you already testified on the day we were before Judge Boll?

A Yes.

Q And you were present at that time

when the State was not ready to proceed?

A Yes.

Q They asked for a continuation?

A Yes.

. . .

[R. 14:3]

THE COURT: All right, ma'am, you are excused. I may attempt to short circuit a major evidentiary hearing here if the State is prepared to stipulate [R. 14:4] to the Defense's assertion that the defendant was arrested in his home without a warrant. Perhaps we can proceed to find out what justification or what explanation the State has for that claim--illegal or warrantless arrest. That is the crux of your claim of prejudice that you can't prove or assert--adequately present testimony on a claim the defendant was arrested at

the home. Is that correct, Mr. Simonson?

MR. SIMONSON: It goes to the excuse, yes.

. . .

[R.14:5] MR. STEWART: All right. We would stipulate that the defendant was arrested in his house by Officer Daley on the 24th of April, 1978, without a warrant.

[R.14:6] THE COURT: And what is the State's claim with respect to the defendant's motion to dismiss for a warrantless arrest in terms of either exigency or a claim of hot pursuit or what have you that would allow the Court to maintain jurisdiction over the defendant based on that?

MR. STEWART: The State's position is that those factors existed at the time the arrest was made.

THE COURT: Which factors?

MR. STEWART: A hot pursuit and the fact that they were--the State was attempting to--because of the nature of this charge, the State was attempting to conserve evidence; that is namely, the importance of getting Mr. Welsh under arrest immediately because of the nature of the charge--operating under the influence.

THE COURT: And, Mr. Simonson, more specifically, what is your claim with respect to what testimony or what evidence you anticipated the two daughters giving that might bear on the State's attempt to assert either hot pursuit or exigent circumstances?

MR. SIMONSON: We, obviously, deny they do not fall within any of the exceptions.

THE COURT: I understand that. I am asking you what testimony or what evidence did you anticipate

adducing from these now supposedly missing witnesses that [R.14:7] would bear on those two questions?

MR. SIMONSON: There would be a time element which was important about hot pursuit and entry into the home.

THE COURT: Well, the State is willing to stipulate to entry into the home, I take it. I just--

MR. SIMONSON: Then there is a time element involved.

THE COURT: Well, why cannot Mrs. Welsh testify with equal competence to the--either the--the defendant's wife or the defendant himself as to the time element, apart from the daughters?

MR. SIMONSON: I understand. If the State will stipulate that they were not admitted into the home by the daughters, then we could proceed with

the testimony of Mrs. Welsh.

THE COURT: What was that now? What did you just say?

MR. SIMONSON: If the State will stipulate that the daughters did not voluntarily admit the officers into the house, then we can proceed with Mrs. Welsh's testimony. That is a case out of Portage. I forgot the name of it.

THE COURT: Are you saying the daughters would testify to the question of the admission being consensual? [R.14:8] MR. SIMONSON: Yes.

THE COURT: Does the State take the position that the officers were consensually admitted to the house and that was the--

MR. STEWART: We take the position that it was a consensual entry into the household.

THE COURT: Now, the daughters

or one of the daughters?

MR. STEWART: Through the daughter and then through Mrs. Welsh.

THE COURT: Through the defendant's wife?

MR. STEWART: Yes, and the defendant's daughter.

MR. SIMONSON: Judge, just so you get your thinking straight, I think the State will admit that the officer knocked at the door, the daughters responded, "We're not here." And during whatever conversation allegedly transpired at the door, the officers walked in. They walked up the stairs. As they are going up the steps they encounter Mrs. Welsh. So, whatever transpired down at the door is in the testimony of the officers. I think there is two or three officers and two daughters.

THE COURT: Well, it seems to

me that the State has multiple grounds it is advancing that would justify-- that would theoretically justify the warrantless [R.14:9] arrest in the home. One is, hot pursuit. And one is, exigent circumstances. And one is, consent.

MR. SIMONSON: They didn't mention it, but I thought I would bring it to your attention. They didn't mention consent.

THE COURT: They did not mention it, but you have just apparently placed that in issue, and apparently that is in issue. It would seem to me that the only time that the defendant might show any irretrievable prejudice is in the event the State would not meet its burden with respect to showing exigent circumstances or hot pursuit, and then tried to rest the validity of the arrest solely upon consent. If

they could show either hot pursuit or exigent circumstances, the consent really--really is unnecessary in terms of their need to justify a warrantless arrest. You take issue with that construction?

MR. SIMONSON: Yes.

. . .[R.14:10]

THE COURT: Well, as I understand it then, the very recent case of--I believe it is Peton vs. Knox (phonetic spellings), the Court said that warrantless arrests in the home were invalid or unconstitutional absent such things as exigent circumstances, hot pursuit or consent. It was not my reading of that case that they said you must have all three. Is that how you read the case?

. . .[R.14:11]

THE COURT: Well, for the purpose of this hearing--and I have

read the last case as well--I would hold that the State does not have to exercise multiple justifications for a warrantless arrest. There are simply a series of well-defined and narrow exceptions to the warrant requirement, any one of which, if satisfied, would justify the use of a warrantless arrest. And I think, in order to avoid the possible conflict, I will turn to Mr. Stewart now and see if he can establish one of the exceptions to the warrant requirement, which he has obviously undertaken to do, by his acknowledgement that there was a warrantless arrest in the home. And if we can avoid even dealing with the issue of consent, because apparently that is really the only major issue that the two supposedly missing witnesses would have relevant testimnony on. Perhaps we can resolve the [R.14:12] issue

without having to get into the issue of consent.

. . .

[R.13:7]

RANDY JABLONIC

Having been called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STEWART:

. . .[R.13:13]

Q Now, approximately--or can you approximate how much time elapsed between the time that you made conversation or had conversation with the defendant? Well, let me put it this way; did a police officer arrive on the scene?

A Yes, sir.

Q How much time elapsed between the time the police officer--his coming on the scene and the defendant departing the scene?

A I really couldn't say how much time. If I were to say shortly thereafter it may be something like three minutes--five minutes. You know, when you are waiting time can seem to be a long time. And yet it wasn't--I would have to say just in plain terms, very shortly thereafter. And then as soon as the officer came over to there, I immediately went up and spoke to the officer and told him what had happened and that--

Q What did you tell the officer? Did you give the officer a description of the individual you had been talking to? [R.13:14]

A I don't recall that I did at the time. I told him that I felt the man was very inebriated or very sick or not very much in possession of his faculties or ability to per-

form. And it was my feeling that he had taken off across the field.

Q What did you base your opinion on that he was inebriated?

A Well, first of all the erratic motion of the car, and then the staggering and slurred speech that he exhibited when he was trying to talk to me.

Q You have seen people or persons under the influence of an intoxicant before?

A Working at the University, it's a common--very common to see many inebriated people, unfortunately.

. . .

CROSS EXAMINATION BY MR. SIMONSON:

. . .[R.13:16]

Q Actually, you do not recall the time that this incident occurred, do you?

A In the back of my mind I remember

thinking that--I told my wife something--I was going to be home. And I was trying to get home to the family, and I would have thought it was after--you know, it was dark. And it was raining. And it was later than I had wanted to get home. And I don't recall if we mentioned a time here, but it seemed to me it was 8:30, or something like that--9:00. I don't specifically recall right here now.

Q It could have been right around 8:30 or 8:00? Between 8:00 and 8:30?

A If that is your pleasure. I don't recall distinctly the exact time that it occurred.

. . . [R. 13-20]

Q You mentioned something that is very interesting--that it was rainy, foggy.

A It was rainy. It was wet, and rainy. When I say "foggy" it may not have been that foggy, but it was a very--it was what you call a poor visibility that evening.

. . .[R.13:22]

Q Now, then so at the time that he is leaving you are--you for the last time, it appears that 15-20 minutes has elapsed since the incident first started.

A That is probably on the outside of the total amount of time. That is the maximum amount of time it would have occurred, by far.

Q At the time he left your presence, the police are not there?

A That is correct.

Q And I think he took off across the field or open area, is that right? [R.13:23]

A Well, he went down the road, and

then, as I recall, towards the east. And it was a grassy area. I thought he was going to circle back to go back to the car.

Q He disappeared from sight?

A Right.

Q At the time he disappears from sight, the police are not there?

A That is correct.

Q And after he disappears from sight, how much time elapsed before the police arrived?

A Well, it is two years ago. But I can recall wondering--I was thinking about it at that time. I was thinking, he is gone. The car is here. Well, I better not leave even though the driver is gone. I better stay and, you know--just about at the same time I am thinking these things, why the police pulled up.

Q So, an unknown period of time further elapsed?

A It was a shorter period of time than--I mean it was practically immediately upon, you know, his departure, because I had barely time to think about, hey this guy is gone. And I am sitting here. What will I do. And then the police come up. And then--you can say this in 10 seconds. But, you know, maybe it was a minute. Or something like that.

Q Or several minutes? [R.13:24]

A I am not--

Q It could have been another five minutes or so?

A That, again, would be the outside, I would say.

. . . [R.13:26]

RICHARD DALEY,

having been called as a witness, being

first duly sworn, [R.13:27] testified as follows:

DIRECT EXAMINATION BY MR. STEWART:

Q State your name for the record.

A Richard J. Daley.

Q Your occupation?

A Police officer for the City of Madison.

Q Were you so employed on the 24th day of April, 1978?

A Yes.

Q And on duty the evening hours of that date?

A Yes.

Q And did you have occasion to be dispatched to any location in the city of Madison at around 8:49 p.m.?

A Yes, I did.

Q Where did you go?

A I was dispatched to the area near Westfield Drive on Mineral Point Road, almost adjacent to West Towne

Mall.

Q Who did you see there, if anyone?

A I met Mr. Jablonic.

Q Is he the individual that just left the courtroom?

A Yes, he was.

Q And did Mr. Jablonic give you some information about an individual operating under the influence?

A Yes, he did.

Q And did he point out an automobile that he stated to you the individual was operating? [R.13:28]

A Yes, he did.

Q And do you recall whether or not that automobile had a license plate on it?

A Yes, it did.

Q And do you recall whether or not you took any action with respect to the license plate number of that vehicle?

A Yes, I ran a data check with the Motor Vehicle Department.

Q What is that?

A That is a radio data control person who checks, via computer, the registration of the vehicle through the Motor Vehicle Department.

Q And did you receive some information?

A Yes.

Q And specifically, did that information tell you the owner or whoever that vehicle was registered to?

A Yes, the registrant.

Q And what name was that?

A That was Edward Welch of 7158 Tree Lane.

Q Do you recall whether or not Mr. Jablonic told you the direction or the street that this individual had gone when he left Mr. Jablonic's presence?

A Yes.

Q What did he say?

A He pointed in the direction across the field, which would be in a northeasterly direction, which is a [R.13:29] field--was Burning Hart Lane (phonetic spelling). It is adjacent to the cemetery, and it leads towards Tree Lane.

Q All right.

. . . [R.13:29]

Q Officer, what did you do? Did Mr. Jablonic give you a description of the individual that was operating the vehicle?

A Yes, he gave me a description of the incident he had observed, and a description of the person he had talked to from the vehicle.

Q Do you recall whether or not he said anything about this individual being under the influence?

A Yes, he had a definite opinion about that.

Q What did he tell you? [R.13:30]

A He said the man was very obviously intoxicated.

A He indicated to you he observed the individual operate the motor vehicle?

A Yes, he did.

Q He told you where he had seen this operation?

A Yes.

Q How much time between the time that you received this information from Mr. Jablonic--well, let's put it this way. Did you go to 7158 Tree Lane?

A Yes, I did.

Q How much time between the time you are discussing this when you got the information from Mr. Jablonic, and your arrival at 7158 Tree Lane?

A I would say that I was in Mr. Jablonic's presence about less than five minutes. And I proceeded directly to Tree Lane, which would have maybe taken a minute and a half, at the most.

A And were you familiar with that location?

A Yes, I was.

Q How so?

A I had an earlier call, perhaps within the week or two weeks prior to that, in which--when I ran the data check of the license plate, and the name came back Edward Welch of 7158 Tree Lane, I recognized that as having been there on an alcoholic related disturbance [R.13:31] in which we, in fact, arrested Mr. Welch prior. So, I knew the name and knew the address.

THE COURT: When you say "we,"

were you involved in that arrest?

A Yes, I was. I was dispatched to assist another officer on that.

Q Upon arrival at 7158 Tree Lane, you knew Mr. Welch resided at that location--I mean from your information?

A Yes, from having heard his name through data I recognized the name and the address.

Q What did you do upon arrival at that location?

A We knocked on the door and--Officer Harless (phonetic spelling) and I. And the door opened and someone opened the door, and we contacted--it was one of his stepdaughters, I believe.

Q What did you say to her?

A We informed her there had been an accident and that we strongly suspected Mr. Welch of having had the

accident and having run home. And we asked that we be able to talk to him.

Q What did she say to you?

MR. SIMONSON: I object to that question being asked and answered. Hearsay.

THE COURT: Well, I think it is being admitted for several purposes at this point: one, to [R.13:32] show prejudice or to find out what the version of that witness may be and--

MR. STEWART: Your Honor, we are going to probable cause. And hearsay is not an objection to the probable cause portion of this hearing.

THE COURT: I would construe this to be a preliminary question of fact that has to do with the admissibility of evidence under

911.01 (4). And under that provision the rules of evidence are made specifically applicable. And under that statutory provision, I feel the officer could answer that.

MR. STEWART:

Q Do you recall the question?

A Would you repeat it, please.

Q I think the question--actually, I forgot.

THE COURT: Officer Daley, what was the defendant's stepdaughter's response when you asked to speak to him?

A She stated something to the effect that he had just stumbled in. It wasn't he had just come in or anything. It was like he just stumbled in and went upstairs, and beckoned us in--allowed us in.

Q What do you mean by she "beckoned you?"

A She opened the door, and she said, "He is upstairs," pointing to the stairway, and that he had just [R.13:33] stumbled in and he is upstairs. And motioned to us, so to speak, that we could go up there.

Q Show the Judge what motion she made towards you or to you.

A Well, she said, "He just stumbled in," or something to that affect. And said, "He is upstairs," and motioned that way--towards the stairs, allowing us to pass.

THE COURT: Go ahead, Mr. Stewart.

Q And did there come a time that that person who identified herself as Patricia Welch, appeared on the scene?

A Yes.

Q Where did you see her?

A I believe we were starting up the

stairs, and she appeared from what I think was the kitchen area. And as we were going up the stairs she stated, you know. "What is going on," or something like that. And we told her that--again, we explained there had been an accident, and that we strongly suspected Mr. Welch of having been involved in the accident. And we would like to speak with him because we thought he was probably under the influence of an intoxicant. And she, at that point, also gave her consent for us to go up, because she said, "Yes, he is in bed. He just got into bed. And something has to be done," referring [R.13:34] to the fact that she recognized me from the earlier-- I assumed she recognized me from the earlier case, and was, I think, saying that she was

concerned about his alcoholic problem. And she indicated, "Something has to be done," and motioned us to the bedroom, or showed us the bedroom where he was at.

Q At any time did she tell you, or his stepdaughter--the defendant's stepdaughter, not to come into the residence?

A No.

Q At any time did they attempt to push you out or restrain you from entering?

A No, I found them to be actually cooperative the other way.

Q When you arrived at the scene with fellow officer--is it Harless--is his name?

A Yes.

Q I take it you were in uniform?

A Yes, both of us.

Q Both of you. Did you have your

weapons in the holster or out of your holster?

A In-holster. Nothing like forced.

Q Did you make any threats towards Patricia Welch or her daughter?

A No.

Q Do you recall either one--that is, Patricia or her [R.13:35] step-daughter, mention anything about Mr. Welch's state of intoxication?

A She just said, "Something has to be done."

THE COURT: "She" being Mrs. Welch?

A Mrs. Welch, the wife. Which seemed to be an acknowledgement that she knew he was intoxicated, and that he had made his way to the bedroom. And she was worried about his condition.

Q Do you recall any statement made by her stating he was highly intoxi-

cated?

A No, not a specific statement. I think it was more--I don't remember a specific statement. I think it was more of an understanding that she knew what the condition was, and she wanted him to get some help.

. . .

MR. STEWART: [R.13:36] . . .

Q Have a look at Exhibit 1 for identification. Do you recognize that exhibit?

A Yes, I do.

Q What is it?

A It is my official officer's report on the incident and the arrest and the contents of the circumstances of that evening.

Q Is there a paragraph--specifically paragraph one--two--three. I believe the Defense has a copy of that, with reference to statements

by Patricia Welch and her husband's state of intoxication.

A Yes, there is. I quote: "I contacted his wife, Patricia, and she stated had, just minutes earlier, stumbled into the house highly intoxicated, and that he went straight to bed."

Q Does that refresh your recollection whether or not she made some statements about his state of intoxication?

A Yes, it does.

Q And it is that he was intoxicated?

A That she said that.

Q Highly intoxicated. All right, did you go upstairs? [R.13:37]

A Yes.

Q And what did you see?

A Well, what we saw on the way upstairs was wet and muddy tracks going, you know, to the bedroom.

And arriving to the bedroom, that she showed us, we observed Mr. Welch lying in bed with no clothes on, and muddy pants immediately next to the bed.

Q All right, and what did you say, if anything, to Mr. Welch?

A We asked him to get up and put on his pants, and that we wanted to speak with him.

Q Did he get up?

A Yes, he did.

Q And did he put his pants on?

Q And what happened after that?

A In speaking with him we could notice the whole room smelled of alcohol. He had a very heavy odor of alcohol about his person. In speaking to him, his speech was very slurred, and so forth. And we had asked both the wife and the stepdaughter, earlier, had he had

anything to drink upon entering the home, and so forth. And they had told us no. We asked him if he had anything to drink, and he said, "No."

. . . [R.13:38]

Q . . . You understand that--are you trained, when you make an arrest for operating under the influence, that you should get that person downtown as soon as poosible?

A Yes.

Q And do you know why?

A Yes.

Q Do you understand that--well, why do you have to get them down there as soon as possible?

A Well, because the alcohol dissipates in the body after a certain period of time. And there are requirements--I believe, it is two hours, that once you submit to the

breathalyzer or some form of blood alcohol test, within two hours of the observed--drive him--or accident etc.

Q Did you place Mr. Welch under arrest?

A Yes, we informed him he was under arrest at that point.

Q Was that inside his house or outside?

A Inside his bedroom.

Q Now, prior to placing him under arrest, what observations--you mentioned some. What did you arrest him for?

A Driving while under the influence of an [R.13:39] intoxicant.

Q What observations did you make with respect to the fact that you felt he was under the influence of an intoxicant?

A In speaking with him, the very

strong odor of alcohol about his breath, the fact that he had to be helped putting on his pants. We had to hold him up, literally. The slurred speech.

. . . [R.13:40]

Q You issued him a citation?

A Yes, we did.

Q For what?

A Driving while under the influence of an intoxicant.

Q And this all occurred in Dane County?

A Yes, it did.

. . .

CROSS EXAMINATION BY MR. SIMONSON:

. . . [R.13:41]

Q So, the 8:45 is when the call came in?

A I believe it is 8:49.

Q Excuse me, 8:49 is when the call came in.

A Yes.

Q So, it takes--within a minute you were dispatched. Where were you located at that time?

A I really couldn't say. I mean I was somewhere in the area. That was my patrol beat. And I would think maybe somewhere within half a mile or so maybe.

Q So it would take a few minutes to get there nonetheless.

A Yes.

Q Anywhere from three to five minutes I suspect.

A I would think from the time I was dispatched, to the time I arrived, might be a minute to two at the very most.

. . .

[R.13:42]

Q You do not know whether or not the defendant had anything to drink

between the time he left Mr. Jablonic's presence and your contacting him in his bedroom? You personally do not know that?

A I personally do not.

Q And so, again, your information is dependent on what other people may have told you? [R.13:43]

A Yes.

Q And usually when you arrest one for intoxicated driving, you try to make sure that they do not have access to anything that would complicate or contaminate the breath sample, is that right?

A That is true.

Q Normally, you would have them under constant observation, even in your own squad car, to make sure they have no cigarettes or--obviously, nothing to drink in your presence. And you admit that there is a span

of time that elapsed since the incident, and before your contacting the defendant?

A Yes.

Q And it is possible, is it not, that during that span of time he could have ingested some alcohol?

A It is possible. Although I do not see how he had opportunity.

. . .

[R.13:44]

(Patricia Welch recalled as a witness.)

FURTHER EXAMINATION BY MR. SIMONSON:

. . .

[R.13:45]

Q Sometime that evening you observed your husband come home?

A Yes.

Q Do you remember the time that he came home?

A No, I wasn't paying any attention.

Probably around 9:00 or a little before. But I don't remember for sure.

. . .

[R.13:46]

Q You and your husband share the same bedroom?

A Yes.

Q Did he, on that evening, have a bottle of liquor up there? [R.13:47]

A As far as I know he did.

Q That is customary?

A Yes.

. . . [R.13:47]

Q And sometime later, officers appeared at the house?

A Um-hum. [R.13:48]

Q Is that right?

A Yes.

Q Where were you at that time?

A Upstairs.

Q You weren't in the kitchen?

A No.

Q But your daughters were downstairs?

A Yes.

Q And you testified before, one of your daughters or both of them opened up the door in response to a knock, I guess.

A Yes.

Q You don't know what transpired down there?

A No.

Q But did you talk to your daughters afterward about what happened downstairs?

A I suppose I did.

Q But you were in my office when one of your daughters gave me a statement of what transpired, right?

A Um-hum.

Q And the Judge allowed the officer to testify what your daughter said. So, I am going to ask you

what your daughter said to--what your daughter told you. Didn't your daughter tell you that the officer merely asked if Mr. Welch was there? [R.13:49]

A I assume they did.

Q And they said, "Yes"--your daughter responded, "Yes?"

A Um-hum.

Q And that the officer came in, in response to the "Yes," is that right?

A As far as I know.

. . .

Q Can you recall what your daughter told you--she told the officer? If you don't, say so. That is all.

A All I remember is when I asked her, she said, "Well, police were at the door." And all I remember is that everything being really confused. And she said, "What was I supposed

to do? So, I let them in." And that is really about all I can remember. [R.13:50]

Q So, you don't know the specific conversation that transpired?

A No.

Q But they came in, and after they came in you encountered one of the officers?

A Yes, I was coming down the stairs, and one of them was coming up the stairs.

Q Do you remember what the officer asked you or said to you?

A I think they asked me if he was upstairs. And I said, "Yes."

Q The officer read into the record this statement. Listen carefully: "I contacted his wife, Patricia, and she stated that her husband had just, minutes earlier, stumbled into the house." Did you say that

to the officer?

A I don't believe that I would have said, "Just minutes earlier," because I just don't--I would have said 15 minutes or half hour or an hour--45 minutes or an hour. "Minutes earlier," isn't the way I talk.

Q As a matter of fact, how much time elapsed between the time that he had come home and the officers came to the house?

A Half an hour to 45 minutes.

. . .

[R.13:51]

Q But your testimony is that it might have been a half hour to 45 minutes later that the officer came to the house?

A I think so, yes.

Q This is after he was home already?

[R.13:52]

A Yes.

Q And then the officers arrested him and he was instructed to put on his clothes. Were you up in the bedroom at that time?

A No, I don't think so. I think I was downstairs.

. . .

Q Did you give the officers authority to enter the house?

A No.

Q Ever?

A No.

Q How many officers were there?

A Three.

. . .

[R.14:14]

THE COURT: All right, do you wish to offer the statement of either the daughters that you apparently took, into evidence? You indicated you took a statement

from one of Mr. Welsh's daughters that may well be provative of part of your argument.

MR. STEWART: Your Honor, I am a little bit confused. I thought one of the arguments of the Defense was that they didn't have an opportunity to--that they had lost some vital testimony. I was unaware that they had a statement. That pretty much indicates--

THE COURT: Well, I was unaware they had a statement until Mr. Simonson indicated that on his examination of Mrs. Welsh. At least that was certainly implicit in one of your questions of Mrs. Welsh. Mrs. Welsh was present when you were interviewing the daughter and taking a statement from her?

MR. SIMONSON: Yes, I have a statement. For what it is worth, I

can put it in if there is no objection.

THE COURT: I doubt Mr. Stewart would have an objection to that.

. . .

[R.14:15]

THE COURT: Well, let's take a look at what you do have, and we will allow you to make a copy. Give that to my clerk and we will have that marked as Exhibit 2.

. . .

[R.14:16]

MR. SIMONSON: I first, at your suggestion, I will offer Exhibit 2.

THE COURT: I will receive Exhibit 2.

. . .

[R.14:23]

THE COURT: . . . And we will

go on from there to the [R.14:24] defendant's motion seeking dismissal on the basis that there was a warrantless arrest of the defendant in his personal residence. And I will hear from you, Mr. Stewart, because it is--Mr. Simonson correctly indicates, I believe, the burden is on you to show one of the possible exceptions to the warrant requirement.

MR. STEWART: Judge, it is the State's position that this situation occurred--basically, what we are dealing with is probable cause that the officer reasonably, prudently, as an officer with the information placed before him,, and did that information give him probable cause to believe that the defendant had committed a crime. We have testimony from Mr. Jablonic

that quite clearly on the record indicates that the defendant was operating a motor vehicle in Dane County; that Mr. Jablonic's testimony that the defendant was under the influence of an intoxicant. He informed the Court of his experience--that is, he observed people under the influence before. He gave this information almost immediately, as he testified to Officer Daley, who arrived on the scene. The information that Mr. Jablonic--well, his observations, plus a description of the defendant, plus he pointed out the vehicle that the defendant was operating. Officer Daley, with that information, in addition to a record check made getting an address of Mr. Jablonic, (sic) [R.14:25] a person that the officer was familiar with from a

previous encounter involving alcohol. That added to the information given by Mr. Jablonic, he proceeded immediately to the Tree Lane residence and was admitted into the residence by one of the defendant's daughters.

The officer testified--and it is not--no evidence was introduced to the contrary--his testimony that they knocked on the door. They were in police uniforms. They did not have their weapons drawn. They did not make any threats to anyone or demand entry. They simply made a request whether or not the defendant resided in that residence, and the daughter indicated, yes, and that he was upstairs and that she gestured to him, "He is up the stairs there." The testimony of the officer with respect to the

defendant's wife that she also indicated that the defendant was upstairs, and basically made a request for the officer to do something about it. The officer testified that he had been dispatched to that residence before and thought that the defendant's wife recognized him from a previous occasion. And, again, upon her request, he went upstairs again. There was no testimony--and I put questions to her whether or not anyone had requested the officers to leave. Whether or not the officers--well, the testimony at least to the officers whether or not they had made threats. I think [R.14:26] we have established from the officer's testimony that he is familiar--his observation of the defendant, that his clothing fit

the description of the person Mr. Jablonic had described to him. The officer testified that Mr. Welsh fit the description, personally, of the person that was identified by Mr. Jablonic.

He testified that there were--he observed water marks on the floor, which I think would indicate that the water marks or the mud marks were put there recently. Not 45 or half an hour later. He also testified, from his experience as a police officer, he is aware of the fact that it is important to preserve evidence. That is, to get a person that is under the influence--if he has probable cause--to get them downtown as quickly as possible to get a breathalyzer sample as evidence of intoxication. I know for that fact, in

addition to the fact that he proceeded immediately, as Mr. Jablonic stated, that the defendant had just left his sight. The officer arrived on the scene. I think we have hot pursuit, and I think we have established the situation where it was very important that the officer entered a dwelling and made the arrest. We also have a consent. So, I think we have three exceptions to the arrest without a warrant.

THE COURT: Thank you, Mr. Stewart. Mr. Simonson. [R.14:27]

MR. SIMONSON: Judge, the record is obviously clear that the State does not come within any of the 13 exceptions to the warrantless arrest prohibition. Apparently, they are relying upon hot pursuit and consent. I heard--and

perhaps also exigent circumstances --what that broad term may envision.

First of all, as to--as to hot pursuit. In all the cases of hot pursuit the defendant has to be within the eyeball distance--vision of the officers, and they have to be pursuing him, and they have to be--have little--minimal break in observation in the chase, in the light. According to Mr. Jablonic's testimony, that as much as between the time of the incident of the accident and--and when the officers arrived at the house or left him at that point in time, about 20--25 minutes had elapsed. Then they contacted the officer. Could we have another five minutes or so? That is getting us pretty close to a half an hour. Now, what I am saying is that the officers arrived

too late to be in hot pursuit. And I think the hot pursuit argument is definitely out the window.

Exigent circumstances--there are many things that I would guess in a drunken driving charge that perhaps would be the destruction of evidence, or whatever the case may be, but also the officer should take into consideration [R.14:28] whether or not there has been anything intervening; the same lapse of time--a lot of things can happen.

THE COURT: Are you saying it would have been reasonable to expect the officer to go get a warrant at that point, and that could have been accomplished in time to still preserve evidence of possible intoxication?

MR. SIMONSON: Yes. At that time--that point in time the offi-

cer should have gotten a warrant for his arrest, but not for drunken driving. Maybe for reckless driving--erratically, but not for drunken driving. He could have gotten that if that is what he needed, or else issued a citation. But the evidence was too cold to charge this man with drunken driving because of a lot of intervening things. Like his wife testified, that he did have a bottle up in his room. But the officer, theoretically, has no knowledge of that. And although he was there the week before, you have no evidence from that which you can conclude that the officer should know there was a bottle up in the room, and somehow that is supposed to be the constitutional touchstone of whether or not he is to get a warrant.

He gets a warrant because time is cold. Everything is cold at this point in time. He has no right to invade our castles. We are still in this country, secure in [R.14:29] our own homes against any action of the State, unless there is some very, very serious exigent circumstances or hot pursuit or one of the other reasons. And that is not present here. Unfortunately--and also there is a serious question about what the officer testified to and what Jablonic testified to. Jablonic didn't smell any alcohol. Jablonic didn't tell him he thought he was intoxicated. The officer came to that conclusion from what he said. Jablonic said he stood outside his window and smelled no odor of intoxicants. He is relying solely on

his gait and his slurring, period.

THE COURT: And his driving.

MR. SIMONSON: And--and some driving--erratic driving. There could be a lot of reasons for all those things. Now, to add intoxication, we have to have some evidence of alcohol. And at the time the officer left the scene, he had no evidence of any alcoholic consumption by this defendant. Usually in an arrest an officer will roll down the window and talk to the guy. He smells intoxicating liquor. That is the tip-off. That is what starts the wheels rolling. And if Jablonic had told the officer that "I think he was drunk because he smelled strongly of alcohol," that would be something. The officers had absolutely not one iota of evidence, according to

Jablonic's testimony, that there is any odor of alcohol upon this man. Now, for the officer to just say--

THE COURT: Perhaps your recollection of the testimony differs. My notes reflect that Mr. Jablonic pointed in the direction of Tree Lane; gave a description of the defendant and the fact that the defendant was intoxicated. That is from Officer Daley's testimony.

MR. SIMONSON: Well, that is self-serving. I am talking about Jablonic. He is the one we have to rely on, and he is the one Daley is relying upon. Now, is Daley saying Jablonic is a liar. Jablonic is the one that testified--very specifically, he was asked the question more than once; "Could you smell alcohol?" "No."

THE COURT: No, the question

is not whether or not he smelled alcohol. The question is whether or not he told Daley that the defendant was under the influence or was drunk.

MR. SIMONSON: And he did not. He told Daley--he says, "Well, I don't know." He told Daley that--as he expressed the testimony of the driving--the slurred speech and the gait.

THE COURT: Well, I also--my notes also reflect that he told--this is from Jablonic's testimony now, that he told the officer what had happened; that [R.14:31] he thought the defendant might be intoxicated, but that he might also be sick.

MR. SIMONSON: Sure. It could be any one of those things. That is probably--that is a lot of sup-

position. And moreover, Judge, the fact that time elapsed--the guy is gone--the guy is at home, and the officer should have known it is too late, as they do in the drug bust. The toilet has flushed, but in this instance he is in his own home, and he--and he has the opportunity to ingest alcohol while he was in his own home. It is just too darn late. Now, if I want to arrest him for something else, he has to go get a warrant. But to get a warrant for his arrest for drunk driving, it's a little bit remote. They lost him. The exigent circumstance situation was lost when this --before the officer even arrived upon the scene.

They could have gotten him--charged him with any number of other things, but not for intoxi-

cated driving, Judge--and then as to the consent issue. There is obviously a--the State has the burden. They didn't carry the burden. Our testimony, overwhelmingly, shows that the officer--a 16-year-old girl answering the door and simply the question was asked; "Is he here?" "Yes." And then they walk in. There was no questions asked, "We want to see him. We are officers. We came to [R.14:32] arrest him." Nothing was informed here. Furthermore, I don't think those stepdaughters have standing to give consent, even if they did--a teenager--a stepdaughter residing in his home. His wife could give consent before they go up, or he could give consent. But those stepdaughters don't have standing to give consent. No, I think under

the circumstances in this case the officers--the trail was lost. There is no evidence to preserve--or nothing too sufficient. The whole thing would have been a sham. They could, if they had wanted to, arrest him on another charge. They could have gone down and gotten a warrant and convinced the District Attorney to draft one. I don't think they could have. I think the DA would have said, "It is too late for drunken driving. We will charge him with something else." Because if they didn't, they would have to wake up the judge at that hour. It had to happen--say the officer--it's pretty close to 9:00. They could have called in and said he knew who it was. They could have called and had the DA draft a complaint, and

that complaint could have been drafted by the time they got down to the City-County building. They could have contacted within a two-hour period--they have two hours to do this. That two hours wouldn't have been up until pretty close to 10:30--11:00.

THE COURT: All right, the Court views the [R.14:33] critical time period here to be the period of time from which the defendant left the scene, until the officer undertook to apprehend him. Because the case was still very much alive while the defendant was still at the scene and driving about, stuck in the mud, and talking to Mr. Jablonic. So, the critical time period is not the point in time from which he ran off the road until the officer started after

him. It is from when Mr. Welsh left the scene until the officer started his apprehension. And there we have fairly strong testimony from Mr. Jablonic, although he doesn't recall exactly how long it was, he put five minutes as the outside time limit from the point in time until Mr. Welsh left, until Officer Daley started his apprehension. And Officer Daley indicates that he was only one or two minutes away when he received the call, and that he spent less than five minutes with Mr. Jablonic before going after the defendant. I think we also have to take into consideration that the officer had, in terms of probable cause, the prior week's experience with an alcohol-related incident with Mr. Welsh at that particular location. And the offi-

cer certainly is entitled to take that into account in weighing--in weighing the--his ability to arrest without a warrant on the evidence that he had. I think Mr. Jablonic --he can certainly can observe what may fairly be described as [R.14:34] probable cause that the defendant was under the influence of an intoxicant. And the question is the reasonableness of Officer Daley then entering the home shortly thereafter without a warrant to arrest the defendant.

I think although Mrs. Welsh, in response to leading questions, did indicate that she felt a half hour to 45 minutes had elapsed from the time the defendant got home, until the police arrived, that testimony is rather strongly impeached or inconsistent with her

earlier testimony that her husband arrived home around 9:00 p.m. and it's that 9:00 p.m. arrival time which strongly corroborates the State's case that it was shortly after the police arrived on the scene that the defendant would have just arrived at home, and then the police arrived shortly thereafter.

It is further corroborated, as Mr. Stewart indicated, by the fact that his clothes were still wet in his bedroom, and that there was apparently fresh muddy footprints leading up the stairs to the defendant's bedroom. The court would find, without having to address the consent issue, that: 1) The police did have probable cause to believe that the defendant had committed the offense of operating while under the influence; and further

find that due to the exigent circumstances of the need to take a breath sample from the defendant in conjunction with [R.14:35] their reasonably hot pursuit, that there was a valid reason for entry into the defendant's home without a warrant in order to apprehend the defendant. This contrasts rather strongly with the last case, which is the case--which is the case that held that the warrantless arrest in one's home is unconstitutional, in which case the police officers arrived at the defendant's home some 13 days after the defendant's involvement in the criminal transaction. Here it would appear that the officers arrived within 10 minutes of the defendant's leaving the scene.

And given the need to avoid

dissipation of alcohol within the body, the officer certainly had an exigency that would have made obtaining a warrant in this case unreasonable, in the Court's view. The defendant seems to argue both ways: 1) That the case was old and cold and that greater periods of time had elapsed on the one hand; and on the other hand, saying there is plenty of time left within the two-hour period in which to get a warrant. And the defendant really cannot argue it both ways. The Court would find both probable cause for arrest and a valid exception to the warrant requirement that require the Court to deny the defendant's motion to dismiss the complaint for lack of probable cause.

. . .

[R.13:53]

(Officer Daley recalled to the stand.)

FURTHER EXAMINATION BY MR. STEWART:

. . .

Q . . . Officer, we are talking about the contact with Mr. Welch on the 4th of April, 1978, in his residence; specifically, in his bedroom. Would you tell the Court, when you first entered the bedroom, what was Mr. Welch doing?

A He was lying in bed.

Q And was he asleep?

A No.

Q Did he say anything to you upon your entering the bedroom?

A No, I believe that we initiated the conversation by telling him why we were there and what we suspected.

Q What did you tell him?

A We told him that we suspected him

of being the driver in the incident off of Mineral Point Road, and that we suspected that he ran to the residence, and that we also [R.13:54] suspected he was under the influence of an intoxicant.

. . .

Q All right. After you informed him as to why you were there, he stated that he wasn't operating the car, is that right?

A Yes.

. . .

[R.13:55]

Q Did he make any mention whether or not he had anything to drink upon arrival at home on the evening of April 24, 1978?

A Yes, he made the statement he hadn't anything to drink. He had not had anything to drink prior to going to bed.

. . .

[R.13:57]

FURTHER EXAMINATION BY MR. SIMONSON:

Q Officer, you arrested the defendant up in the bedroom?

A Yes, sir.

Q Was that before or after he put his clothes on?

A After he put his pants on.

Q After you made inquiry of him whether or not he had been drinking, did you advise him of his Miranda warnings? [R.13:58]

A No, sir.

Q At the time that you walked in the room you said you initiated the conversation?

A Yes.

Q And you said something to the effect that--you said we were there because, "You are suspected of driving a car and also suspected of

intoxicated driving?"

A Yes, generally that was what was said.

Q At that point in time he was not free to go, was he?

A I don't believe he would have been, no.

Q So, really at that point in time, even though you didn't tell him he was under arrest, he was under arrest, was he not?

A Well, no, I don't believe that he was under arrest until we told him he was under arrest.

Q What question did you ask of him when he responded--allegedly responded, saying that he had not had anything to drink before going to bed?

A I don't believe we asked him anymore questions, other than whether or not he had anything to drink.

We were concerned as to whether or not, between the accident and the time that we contacted him, whether he had anything to drink. That was our main question.

. . .

[R.13:59]

Q But the reason you went into the house was to arrest him, true?.

. . .

A Yes.

Q So, technically, he was under arrest the moment you walked in the house?

A [R.13:60] No.

Q In the bedroom door?

A No, sir.

Q But it was your mental intent, when you went into the house, to have him arrested for drunken driving?

A Well, it was my mental intent to go in the house and determine if he

was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my intent to investigate it up to that point and make a determination.

Q And you did not disclose to him that it was your intent to arrest him if he had been drinking?

A I don't think that was stated in so many words.

Q And you never did give him his Miranda rights?

A Not up to that point, no.

. . .

FURTHER EXAMINATION BY MR. STEWART:

Q Officer, upon entry into this Welch residence, did you ever make any statements to anyone that you intended to arrest him, or that you

were there to investigate an accident?

A Again, I can't remember the specific language. However, [R.13:61] I conveyed to both the daughter--stepdaughter and the mother that we were there in regards to the accident at Mineral Point Road and Westfield, and that we strongly suspected that Mr. Welch had returned home, and that we wished to speak with him about the incident.

Q Okay.

THE COURT: Officer, you didn't offer the defendant anything in exchange for his answering these questions, I take it, did you?

A No.

THE COURT: Is it your testimony that the defendant offered--answered your questions freely and voluntarily?

A Yes, sir.

THE COURT: Was he under any duress or coercion, other than which may have been inherent in the situation?

A None whatsoever.

. . .

[R.14:41]

THE COURT: Is there a refusal in this matter?

MR. STEWART: There is a refusal. I would ask the Court whether or not there is a request for a refusal hearing.

THE COURT: Have you requested a refusal hearing?

. . .

[R.14:42]

MR. SIMONSON: June 19, 1978.

THE COURT: What is the reference to that date? [R.14:43]

MR. SIMONSON: Enclosed is my

client's request for implied consent hearing pursuant to 343.305(7)(c).

THE COURT: Was that hearing ever held?

MR. SIMONSON: Nope.

THE COURT: All right.

MR. SIMONSON: June 19, 1978, and that should be in the court file.

THE COURT: Well, that would have been in the old file, which is not before me.

MR. SIMONSON: I guess so. I don't think I have to renew it every time they re-did the complaint.

THE COURT: I think I would be inclined to agree that one request is all that would be required. Do you dispute that, Mr. Stewart.

MR. STEWART: I don't know the

answer to that.

THE COURT: Well, if you--we will schedule a refusal matter. If you think somehow it has been waived or you don't know if he is entitled to one, I will let you bring on a motion to that effect.

. . .

R.10:1
STATE OF WISCONSIN : CIRCUIT COURT :
FOR DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

VS. Case No. 80 CT 243

EDWARD G. WELSH,

Defendant.

DATE: September 5, 1980

BEFORE: Honorable MARK A. FRANKEL, Circuit Judge

. . .

PROCEEDINGS: Transcript of Reasonableness Hearing

. . .

R.10:4

RICHARD J. DALEY,

Called as a witness for the State, having been first duly sworn or affirmed, testified as follows:

. . .

R.10:11
CROSS-EXAMINATION BY MR. SIMONSON:

Q Officer, did you arrest the defendant without a warrant in his home?

A Yes.

Q And you arrested him at some period

of time following your receiving a report of an incident, is that right?

MR. STEWART: I would object to this line of questioning.

MR. SIMONSON: The hearing is predicated upon lawful arrest.

MR. STEWART: I disagree.

MR. SIMONSON: And the questions also go to my issue of reasonableness.

THE COURT: It doesn't say "lawful arrest". The statute just says, ". . .it was under arrest".

MR. SIMONSON: All judicial proceedings have to be founded upon lawful arrest.

THE COURT: That's not true -- that's "Archie Simonson on arrest," but that's not the laws according to this State. I would entertain an offer of proof from you concern-

ing the relevance as to reasonableness. It may well have some substantial bearing on that.

MR. SIMONSON: I think it -- I just have a couple of questions; let me get the record in.

. . . [R.10:12]

(The pending question was read by the reporter.)

A Yes.

Q You were present at a preliminary hearing in this court, were you not, at which the issue of your arrest was decided by the Court?

A I believe it was decided by the Court.

Q And do you recall the testimony being presented that there might have been a delay of ten minutes to forty-five minutes between my client's arrival at the house and your arrival at the house? [R.10:13]

A No, there could not have been forty-five minutes in between there.

Q I did not say "forty-five". There was testimony of between ten and forty-five minutes.

A I would have to refresh my recollection from the court -- I know it was approximately eleven minutes.

Q All right. The eleven-minute span we're talking about, that's from the time you arrived at the scene and talked to a witness and then proceeded down to my client's residence?

A No.

Q The eleven-minute span was between the time of the incident and your arrival at his house?

A Yes.

. . . [R.10:13]

Q And you admitted that my client was at the house at the time you were

there?

A Yes.

Q And he was there for a period of time before you got there?

A Yes.

Q And you admitted it's within the realm of possibility [R.10:14] that he would have had an opportunity to consume alcoholic beverages before you got there?

A Yes.

Q And the fact that he would have consumed alcoholic beverages at that time would have influenced any breathalyzer test he would have taken thereafter?

A Yes, it would have.

. . . [R.10:17]

EDWARD G. WELSH,

Called as a witness on his own behalf, previously having been sworn or affirmed, testified as follows:

DIRECT EXAMINATION BY MR. SIMONSON:

Q Do you remember the evening in question, Mr. Welsh?

A Yes.

Q And it is true that you arrived home sometime ahead of the officers?

A Right, yes.

Q All right, from your recall what period of time elapsed from the time you arrived at the house and the officers?

A I would say a half-hour to forty-five minutes.

Q Now, when you arrived home who was present in the house at the time?

A The girls and I came --

Q You say, "the girls" -- that includes your wife?

A Yes, she was home, yes.

Q You have her two daughters?

[R.10:18]

A Right.

Q And, tell us what you did when you came home.

A Came home, came in, went to the hallway, hung up my coat, went upstairs, and met my wife. She was upstairs and I went up and took my clothes off and put them in the bathroom and got into bed.

I had a pint of Canadian Club in there and I took a couple of good drinks of it and got into bed and started to go to sleep. It was cold out.

. . . [R.10:18]

Q Then what happened?

A I was woke up by three officers standing in my bedroom, in the doorway of the bedroom, you know.

Q Did you have any clothes on?

A No, I was under the blankets.

Q Now, the officers were there and what happened?

A Well, they started to come in, as far as I can remember, and one of them -- they said, "Get on your clothes and come downstairs. We're going to take you downtown".

Q In other words, you were arrested?

A Yes.

Q And they didn't have a warrant? [R.10:19]

A No.

Q And no permission to enter your house?

A No.

Q So, they took you downtown?

A First I asked them to leave the bedroom because I didn't have any clothes on, so I could get dressed, and two of them went downstairs and the other one stood on the stairway. So I got dressed and came down and they took me right on downtown, no "if's, and's or but's"

about it.

Q You said you took a couple belts from a --

A Pint.

Q Do you have any idea how much you consumed?

A Well, it was, I would judge, prett'near half of it and I use it for pain, too.

Q Well, I think it's fair to tell why you have pain.

A I have rheumatoid arthritis and I have to take a lot of medications for this chronic disease.

A Aren't you under some disability program because of that?

A Yes, Social Security Disability.

Q So they took you downtown and asked you to take a breathalyzer test?

A Right.

Q You didn't take it?

A No. I was going to and then the

one man -- I don't know [R.10:20] if he was an officer or what -- we got talking and I said, "Is this law in effect now?" and he said, "No, it wouldn't be for another month," and I said, "If that's the case I am not going to take it because I don't like machines".

. . .[R.10:21]

CROSS-EXAMINATION BY MR. STEWART:

Q What time did you consume the alcohol you testified to?

A You mean the last, when I was in the bedroom?

Q Yes.

A Well, I forgot just the time period there, but it was when I came home and got undressed. It's been so long I can't remember the time and that.

Q Do you remember what time the officers came into your bedroom?

A Well, like I said, it would be, I would judge, about thirty to forty minutes after I got home. I was about asleep.

Q How long did they stay in your bedroom? [R.10:22]

A Well, it wasn't very long. I asked them -- I didn't have any clothes on and I asked if they would leave, and I got up and got on my clothes.

A Then they took you downtown?

A Yes.

Q And how long after they arrived in your bedroom did they take you downtown?

A It was very soon, just a matter of how much time it took me to get dressed and I came downstairs and right on out, right to the car.

Q And soon after your arrival downtown they offered this breathalyzer test to you?

A Right.

. . . [R.10:24]

THE COURT: . . . [T]here may be a difference between the legality of it and the reasonableness of it. Those two issues may be somewhat different. In other words, it may be reasonable but it may be illegal because there may not have been an opportunity to get a warrant.

MR. SIMONSON: We already have a warrantless arrest, so it's unreasonable until the State proves to the contrary. You may want to ask the State's witnesses why they went in without a warrant to justify it.

THE COURT: I think I have already gotten that.

. . . [R.10:25]

THE COURT: Now for three of-

ficers to barge in with no reason on a wet, rainy night, confront the defendant in his bedroom and tell him to come down to the City-County building to take a breathalyzer test, if they have got no good reason to do that, or if the defendant feels that he's given the officers no good reason to do that, then, obviously, the request is a whole lot more unreasonable than if he's been out and acting in conformity with the actions that the State alleged in the earlier hearing.

MR. SIMONSON: Judge, that's not the point. He's entitled to the Constitutional process of a warrantless arrest as being unlawful automatically.

THE COURT: Unless it meets one of the exceptions.

. . . [R.10:26]

THE COURT: . . . The State has made its case as to what it's done in terms of arresting the defendant and taking him down to the station and reading him his rights. Now you have come along after the State has rested its case and raised the issue that the defendant's refusal was reasonable because the State on its part unreasonably arrested him in his bedroom in the middle of the night, as I understand it.

MR. SIMONSON: Your Honor, you're carrying it too far. He refused because he was arrested without a warrant.

THE COURT: So, you're taking a purely legal position?

MR. SIMONSON: Yes.

. . . [R.10:27]

MR. SIMONSON: He's entitled to that Fourth Amendment right whether he knows it or not.

THE COURT: What are you claiming, that it's an objective standard as to whether or not he's been illegally arrested or his subjective belief that he was illegally arrested, because those are two very different standards? If you are willing to concede that your premise is upon the reasonableness of this question on the objective standard that he was arrested without a warrant then you're absolutely correct. My whole line of inquiry was inappropriate.

MR. SIMONSON: That's the basis of it.

THE COURT: Then I will withhold that line of reasoning. I have already ruled that that was a

valid warrantless arrest.

MR. SIMONSON: Yes, you have, Judge.

THE COURT: And I think the Court, simply for the purposes of consistency, would have to maintain the same ruling. I apologize. I assumed you were predicating your argument as to this defendant's subjective belief as to what he felt to be a warrantless arrest, and I now have clarified, I think, that issue.

. . . [R.10:30]

THE COURT: . . . Mr. Welsh, let me ask whether you gave any explanation or reasons for not taking the breathalyzer to any of the arresting officers?

MR. SIMONSON: I object to that question because it's without foundation. The question should be

asked as to whether he was asked to give any explanation.

THE COURT: I will give you the opportunity to more fully explore that.

MR. SIMONSON: I don't want that question asked.

THE COURT: Were you asked to give any reasons for your failure to take the test?

THE WITNESS: Not as far as I can remember.

THE COURT: Did you offer any reasons?

THE WITNESS: No.

THE COURT: Why not?

MR. SIMONSON: I object to that question [R.10:31] because he doesn't have to answer "why not". It's not relevant.

THE COURT: It may or may not be relevant. I think there's a

problem here, Mr. Simonson, under the old statutory standard and that is that reasonableness -- unless you can give me some objective definition -- is a very subjective standard, is it not?

MR. SIMONSON: Yeah, but in this case common sense will --

THE COURT: I think common sense will also indicate where there is no criminal liability attached I think it would be reasonable to tell the officer why, the reason you're not --

MR. SIMONSON: Not under the Constitution.

THE COURT: This is a civil test. The Constitution has nothing to do with it. You are required to take the test unless there is a reasonable explanation as to why you don't take the test and you

have got civil consequences which will attach.

. . . [R.10:37]

THE COURT: Mr. Stewart, do you wish to offer your opinion on the reasonableness or unreasonableness of the defendant's refusal?

MR. STEWART: Yes. It's the State's position that the reasonableness for refusal is basically a procedural hearing. The State is required to do certain things in order to request a person to take a chemical test of his breath. Under the law and the mere nature of it you have implied consent.

When you get a driver's license you have agreed to consent to take the breathalyzer test and you have to have a reason or reasons for not taking that. My understanding of the law, although it is

under the old system, is that the only reasonable reason for not taking the test is a physical reason why you can't take it.

The fact that a person operating under the influence, or charged with that, in their mind thinks that either the police don't have probable cause or that the police [R.10:38] didn't see them operating a car, or the fact that they had some alcohol to drink -- that's irrelevant. That's not an issue in a reasonableness hearing. It's whether or not it was reasonable under the circumstances.

. . . [R.10:38]

I think the State has complied with all the requirements and the only reason the defendant would not take it is that it was unreasonable, and I would ask the Court to

rule it was an unreasonable refusal. I don't think the other issue of a warrantless arrest is relevant to that issue. [R.10:39]

THE COURT: I think if I were incorrect in my view of the law I would concede, in all likelihood, Mr. Simonson's point that the officers may not gather evidence or they may not pursue action against the defendant if it was a direct consequence of an unlawful arrest, but, as I indicated earlier, the Court is bound by its earlier ruling that that was a valid arrest.

And, I think Mr. Simonson certainly will have the right to challenge that on appeal if he appeals this matter, as well as the previous ruling should there be a conviction on the underlying charge.

. . .

[R.10:44]

THE COURT: The Court will make the following findings. It appears to be uncontested that the State has met its various responsibilities at this hearing on all the issues with respect to other than the question of reasonableness.

The defendant takes issue with the unreasonableness of his refusal on two grounds. One of those grounds is that subsequent to his driving he consumed approximately [R.10:45] one-half pint of whiskey and therefore believed that the test results would be unreliable. And, secondly, that his proceeding arrest was an invalid warrantless arrest.

With respect to the second issue raised by the defendant, as the Court has already ruled, the

Court believes that because of the exigencies of that circumstance and the type of instrument involved that that was not an illegal, warrantless arrrest but rather one that was justified due to the circumstances of that situation or one that was justified by the "hot pursuit" exception to the warrant requirement, and therefore would as a matter of law find that not to be a basis on which to find the defendant's refusal reasonable.

. . . [R.10:46]

Therefore, under all the circumstances, the Court would find the defendant's refusal to be unreasonable and would enter a suspension of the defendant's operating privileges for the statutorily provided period of 60 days.

No. 80-1686

STATE OF WISCONSIN : IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD WELSH,

Defendant-Appellant.

APPEAL from the order of the circuit court for Dane county: MARK A. FRANKEL, Judge. Vacated and remanded.

GARTZKE, P.J. Edward Welsh refused to take a breath test required by sec. 343.305(2), Stats., following a warrantless arrest in his home for violating sec. 346.63(1), Stats., operating a motor vehicle while under the influence of an intoxicant. A refusal hearing resulted in an order revoking his operating privilege from which defendant appeals. Prior to the refusal hearing,

defendant challenged the validity of his arrest. At the close of the evidentiary hearing, the trial court determined that it was unnecessary to decide whether the police entered defendant's home with consent, because exigent circumstances justified the arrest. We disagree and remand for findings on the consent issue.

The facts prior to the officer's arrival at defendant's home are undisputed. A witness testified that he saw defendant's car operate erratically and leave the road about 8:30 p.m., April 24, 1978. The witness stopped and defendant asked him for a ride home. When the witness refused, defendant walked away and the witness stayed at the scene. Another person called the police. About five minutes later Officer Daley arrived. The witness told Daley what he had seen and that he

thought defendant was possibly under the influence. Daley checked with the Motor Vehicle Department and learned that the car was registered to defendant. Daley and another officer arrived at defendant's home about 9:00 p.m. Daley testified he went to the house to arrest defendant and that he knew alcohol dissipates from the body with time.

Officer Daley testified that he and the other officer were admitted into the house, that defendant's wife advised Daley that defendant had stumbled into the house highly intoxicated and was upstairs in bed and that she told Daley she was concerned about the defendant's alcoholic problem and "something has to be done." Daley entered the upstairs bedroom where he found and arrested defendant.

Defendant's wife testified that she was upstairs when the police arrived

and that she told the officers only that her husband was upstairs. She did not know what happened at the door when the police knocked but related the version given to her by her daughters. The daughters' story, as related by Mrs. Welsh without objection, is perhaps ambiguous. Officer Daley testified that defendant's daughter answered the door, opened it, said, "He is upstairs," pointed to the stairway, and allowed the officers to pass. Daley testified that Mrs. Welsh came out of the kitchen and gave her consent to the officers to go upstairs.

The trial court found that the officers arrived at defendant's home within ten minutes after he left the scene of the accident and that exigent circumstances existed for entering defendant's home without a warrant to arrest him. In the trial court's view,

the exigency arose out of hot pursuit and the need to preserve evidence of intoxication which could be lost because alcohol is dissipated from the body with the passage of time.

In the absence of consent or exigent circumstances, entry into a home to make an arrest is unreasonable under the fourth amendment to the United States constitution unless done pursuant to a warrant. Steagald v. United States, ___ U.S. _____ (decided April 21, 1981); Payton v. New York, 445 U.S. 573, 583 (1980) ("Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest" where no exigent circumstances).

What constitutes exigent circumstances or consent is a mixed question of fact and law. The factual basis for

the court's finding of exigent circumstances is not substantially disputed. The conclusion that exigency existed is a question of law. We are not bound by the trial court's conclusion of law. First Nat. Leasing Corp. v. Madison, 81 Wis. 2d 205, 208, 260 N.W.2d 251, 253 (1977).

Exigent circumstances may permit officers to make a valid warrantless arrest of a suspect in his home. In Maryland Penitentiary v. Hayden, 387 U.S. 294 (12967), an armed robbery suspect fled into a house. The Supreme Court held that exigent circumstances justified a warrantless police entry five minutes later "to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them." 387 U.S. at 298. In United States v. Santana, 427 U.S. 38 (1976),

when police attempted to arrest a narcotics dealer in the doorway of her home, she retreated into the hallway and the officers pursued and arrested her. The Supreme Court held that the fact that the pursuit ended almost as soon as it began did not render it less than a "hot pursuit," and the realistic expectation that any delay would result in the destruction of evidence justified the warrantless entry and arrest. 427 U.S. at 43.

The ultimate test is whether the entry and arrest were reasonable. Camara v. Municipal Court, 387 U.S. 523, 539 (1967). "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." 387 U.S. at 536-37.

The need to search defendant's home

to preserve evidence was low compared to the interest invaded by the search. A violation of sec. 346.63(1), Stats., while serious, is a misdemeanor rather than a felony because it is not punishable by imprisonment in the Wisconsin state prison. Secs. 346.65(2) and (3) and 939.60, Stats. There is no evidence that injuries resulted from this single-car accident or that defendant was armed, violent or dangerous to himself or others after he left his car. Having arrived at his family home, whatever risk arose from his apparent intoxication was substantially reduced. There is no evidence that his wife or daughters needed help.

The privacy of the home is among our highest values. Invalidating a warrantless arrest after a warrantless entry, the Wisconsin Supreme Court emphasized that "one's home is entitled

to special dignity and sanctity." Laasch v. State, 84 Wis. 2d 578, 594, 267 N.W.2d 278, 282 (1978). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Payton, 445 U.S. at 589-90, quoting Silverman v. United States, 365 U.S. 505, 511 (1961).

The prosecution relies on State v. Bentley, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979), which held that where there was probable cause to believe that a driver was guilty of the intoxicated use of a motor vehicle, the fact that blood rapidly metabolizes alcohol was an exigency which justified taking a blood sample from the driver without his consent. Bentley relied on Schmerber v. California, 384 U.S. 757 (1966). Schmerber held that if delay

in obtaining a warrant threatens the destruction of evidence of a criminal offense because the percentage of alcohol in the blood begins to diminish shortly after drinking stops, a warrant is unnecessary to take blood from the arrested person in a hospital. 384 U.S. at 770-71.

Bentley and Schmerber, supra, do not apply. The defendant in Bentley was charged with two counts of homicide and three counts of injury by intoxicated use of a motor vehicle, his home was not invaded without a warrant, and the exigency was sufficiently great in the view of the officers as to require forcibly taking a blood sample in a hospital. The defendant in Schmerber was involved in an accident in which he and a companion were injured and his home was not invaded. Welsh, on the other hand, was involved in a single-

car accident with no apparent injuries, his home was invaded and the officers only requested that he submit to a blood alcohol content test.

We hold that the warrantless entry and arrest of defendant in his home was unreasonable and violates the fourth and fourteenth amendments to the United States Constitution, unless entry was gained by consent.

A warrantless entry of a home is valid if permission to search is obtained from a person who possesses common authority or other sufficient relationship to the premises or property. United States v. Matlock, 415 U.S. 164, 172 (1974). Because consent is an undecided issue, the trial court's findings are inadequate. We remand for a finding by the trial court whether the officers entered the defendant's home

with permission.[1]

By the Court.--Order revoking defendant's Wisconsin driver's license is vacated and the matter is remanded for further findings consistent with this opinion.

Inclusion in the official reports is not recommended.

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[1]Appellant moved to strike as unsupported by the record a portion of the state's brief relating to the circumstances of the officers' entry. Because we have remanded for finding on the consent issue, it is premature for us to treat the issues raised by appellant's motion. The motion is denied for that reason.

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD G. WELSH,

Defendant-Appellant.

Supreme Court

WILLIAM G. CALLOW, J. This is a review of a May 26, 1981, decision of the court of appeals vacating an order of Dane County Circuit Judge Mark A. Frankel and remanding the matter to the circuit court for further proceedings. We reverse the decision of the court of appeals and affirm the order of the circuit court. The trial court revoked the defendant's motor vehicle operator's license for sixty days pursuant to his unreasonable refusal to submit to a breathalyzer test, as required by sec.

343.305(2)(a), Stats. 1977,[1] after having been issued a citation for the operation of a motor vehicle while under the influence of an intoxicant. Section 346.63(1), Stats. 1977.[2]

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[1]Section 343.305(2)(a), Stats. 1977 provides that

"Revocation of license on refusal to submit to tests . . . (2)(a) If a law enforcement officer has probable cause to believe that a person has violated s. 346.63(1) or a local ordinance in conformity therewith, the officer may request the person, prior to arrest and issuance of a citation, to take a preliminary breath test for the purpose specified under sub. (1), using a device approved by the department for the purpose. A person may refuse to take a preliminary breath test without being subject to revocation under sub. (9) if he or she consents, after arrest, to take a test under par. (b). Neither the results of the preliminary breath test nor the fact that it was administered shall be admissible in any action or proceeding in which it is material to prove that the person was under the influence of an intoxicant or a controlled substance." Id.

[2] Section 346.63(1), Stats. 1977, provides that "[n]o person may drive or

The defendant challenges the officer's warrantless arrest in his residence as violating the Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution.[3] The circuit court up-

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operate a motor vehicle while under the influence of an intoxicant or a controlled substance."

[3]The requirements contained in the Fourth Amendment of the Federal Constitution are binding against the states through the Fourteenth Amendment. Further, the provisions of the Fourth Amendment to the Federal Constitution are identical to those contained in Article I, sec. 11 of the Wisconsin Constitution. Both provide that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution Amendment IV; see Wisconsin Constitution, Article I, sec. 11.

held this warrantless arrest concluding that probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant, coupled with the existence of exigent circumstances, justified the officers' entry into the defendant's residence. The defendant appealed from this circuit court order, and a single judge of the court of appeals reversed the trial court, holding that, although the officers' warrantless arrest was unreasonable, thereby violating the Fourth and Fourteenth Amendments, the absence of a finding regarding a consensual entry necessitated remanding the case on that issue. We affirm the findings of the circuit court, holding that the co-existence of probable cause and exigent circumstances in this case justifies the warrantless arrest and obviates any further discussion concerning

the issue of consensual entry.

Prior to resolving the merits of this case, the state challenges the single-judge ruling of the court of appeals, contending that this should have been decided by a three-judge panel. Section 752.31(2), Stats. 1977, provides a categorization of cases subject to review by a single court of appeals judge, as opposed to a three-judge panel.[4]

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[4]Section 752.31(1),(2),(3), Stats. 1977 provides:

"752.31 Disposition of cases. (1) Except as otherwise provided in this section, the court of appeals shall sit in panels of 3 judges to dispose of cases on their merits.

"(2) Appeals to the court of appeals in the following types of cases shall be heard as specified in sub. (3):

"(a) Cases under ch. 199.

"(b) Municipal ordinance violation cases.

"(c) Cases involving violations of traffic regulations, as defined in s. 345.20(1)(a).

"(d) Cases under ch. 51.

"(e) Cases under ch. 48.

"(f) Misdemeanors.

This dispute focuses on whether the defendant's unreasonable refusal to submit to a breathalyzer test pursuant to sec. 343.305(2)(a), Stats. 1977, falls within the purview of sec. 752.31(2)(c), Stats. 1977, authorizing a single-judge appeal in cases involving violations of traffic regulations. The state contends that the statutory penalty imposed for violation of a traffic regulation, as defined in sec. 345.20(1)(a), Stats. 1977, is a forfeiture. According to sec. 288.01, Stats. 1977, however, a forfeiture is

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"(3) A case specified under sub. (2) shall be heard by one court of appeals judge, except that any party on appeal may move in writing to the chief judge of the court of appeals that the case be heard by a 3-judge panel. The chief judge may grant or deny the request ex parte. Any appeal which is heard by a single court of appeals judge shall be heard in the county where the case or action originated if any party so requests."

defined as "any penalty, in money or goods" and the penalty pursuant to violating sec. 343.305, Stats. 1977 is a suspension of operating privileges. Consequently, the state argues that a suspension is not a forfeiture and therefore is not included within the parameters established in sec. 752.31(2), Stats. 1977. The defendant's timely notice of appeal conferring jurisdiction to the court of appeals vitiates the need to determine whether sec. 343.305(2)(a), Stats. 1977, is a traffic regulation. For if the court of appeals in its exercise of jurisdiction erroneously assigns this case to a single judge rather than to a panel, this alleged error, and we need not rule whether the court of appeals erred in this case, was waived when neither the state nor the defendant interposed a timely objection. Although

resolving this issue is unnecessary in the present case, it is instructive to note that sec. 752.31(2)(c), Stats., 1979-1980, was recently amended to include license suspension "cases under sec. 343.305," thereby expressly incorporating these cases within the parameters of sec. 752.31(2)(c), authorizing a single judge appeal. See sec. 2, ch. 152, Laws of 1981 (effective March 31, 1982).

The factual sequence underlying this dispute can be summarized through the testimony of the sole witness, Randy Jablonic. On the evening of April 24, 1978, Jablonic, a University of Wisconsin rowing coach, was driving alone in his truck. It was raining. He noticed that the driver of the automobile ahead of him was experiencing difficulty in operating his vehicle. In addition to the automobile's erratic speed, it was

moving from side to side, crossing into the opposing lane, barely missing a road sign, a median strip, and the oncoming traffic. The vehicle ultimately left the road entirely and drove into a field where it either became stuck or stalled.

Jablonic, concerned that the car might return to the road and fearful "[b]ecause I realized [he] would probably kill somebody" remained at the scene blocking the car to be certain that the car did not return to the highway. A motorist stopped and Jablonic requested her to alert the police. An officer arrived at the scene shortly thereafter.

Prior to the officer's arrival, however, the driver left the automobile in the field and approached Jablonic's truck. Jablonic testified that the driver asked him for a ride home but Jablonic replied that they should wait for assistance in removing or repairing the

car, rather than leaving it in the field. At this point the driver became alarmed and "broke into a very slurred conversation--'you wouldn't get your cops'--or something it was very insecure and not very controlled conversation." The driver then left Jablonic and headed back across the field abandoning the automobile and departing from the scene of the accident.

The police arrived "practically immediately upon, . . . his departure" and spoke with Jablonic who had remained at the scene. Jablonic responded to the officer's inquiry by describing his observations of the automobile and its driver. Jablonic told the officer that he believed that the driver "was very inebriated or very sick or not very much in possession of his faculties or ability to perform." When asked at trial what formed the basis of his opinion

that the defendant was inebriated, he testified ". . . the erratic motion of the car, and then the staggering and slurred speech that [the driver] exhibited when he was trying to talk" constituted the basis upon which he formed his conclusion that the driver was intoxicated. He further described the driver's walk as unsteady and unsure. He stated that when he spoke with the driver at the roadside he had remained in his truck. Consequently, he declared that he had "no opportunity to smell the [driver's] breath." Jablonic further testified that he commonly "see[s] many inebriated people, unfortunately," demonstrating his familiarity with the symptons [sic] of intoxication. Although Jablonic stated that "he [the driver] was very inebriated or very sick or not very much in possession of his faculties or ability to perform," this

statement, when considered within the context of the entire record, demonstrates the propriety of the trial judge's conclusion that Jablonic conveyed the definite impression that the driver was intoxicated. Jablonic's reference to illness was merely a remote possibility which provided an alternative, more charitable explanation--illness--to account for his erratic driving, unsteady movements, and slurred speech. The record supports the trial judge's ruling that the officer had probable cause to believe that the driver was intoxicated.

At the scene of the accident the officer ran a license check to determine the vehicle owner's identity. Although the officer could not conclude that the owner of the abandoned automobile was necessarily its driver, he did correctly recall that he wa involved in the arrest

of the owner in an alcohol-related disturbance within two weeks prior to this accident. The officer's recollection was sufficiently pertinent to provide additional evidence to support the existence of probable cause.

Acting upon his collective knowledge of the situation, the officer proceeded immediately to the defendant's residence which was located near the scene of the accident. Attempting to confirm his belief that the defendant had, in fact, been driving his abandoned vehicle while under the influence of an intoxicant, the officer, arriving at the defendant's residence, asked the defendant's stepdaughter if the defendant was at home. The officer testified that she replied, he had "just stumbled in . . . ." "He is upstairs, and motioned that way--towards the stairs, allowing us to pass." Proceeding up the staircase, the officer

encountered the defendant's wife. He testified that she asked:

"'What is going on,'. . . again, we explained there had been an accident, . . . And we would like to speak with him because we thought he was probably under the influence of an intoxicant. And she, at that point, also gave her consent for us to go up, because she said, 'Yes, he is in bed. He just got into bed. And something has to be done,' referring to the fact that she recognized me from the earlier--I assumed she recognized me from the earlier case, and was, I think, saying that she was concerned about his alcoholic problem. And she indicated, 'Something has to be done,' and motioned us to the bedroom." (Emphasis added).

Affirming the trial court's dual finding of probable cause and exigent circumstances vitiates the need to remand this case to the circuit court on the issue of consensual entry, as was ordered by the court of appeals.

The issue in the present case addresses the delicate interrelationship between the individual's right to privacy and the governmental responsibility to enforce the law in a manner which

serves the public interest. To prevail in this case, the state must prove the co-existence of probable cause[5]

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[5]The arrest in the present case is statutorily authorized in sec. 345.22, Stats. 1977. This statute only requires probable or reasonable cause to effectuate a warrantless arrest.

Section 345.22, Stats. 1977, provides:

"345.22 Authority to arrest without a warrant. A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."

The "reasonable grounds to believe" language in sec. 345.22 is synonomous with the constitutional standard of probable cause. Johnson v. State, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977). Consequently, our reference to probable cause in the present case shall be interpreted as being used interchangeably with and meeting the statutory standard of "reasonable grounds to believe." Section 345.22, Stats. 1977.

Section 345.22 only requires probable cause in its authorization of a warrantless arrest for violation of a traffic regulation. The instant case, however, meets the statutory probable cause standard in addition to meeting the case law requirements of probable cause coupled with exigent circumstances.

and exigent circumstances, justifying the officer's conduct at the defendant's residence. We hold that there was ample evidence supporting the trial court's ruling that the officer's entry was justified on the basis of both probable cause and exigent circumstances. Entry to effect a warrantless arrest in a residence is subject to the limitations imposed by both the United States and the Wisconsin Constitutions. U.S. Const. amend. IV; Wis. Const. art. I, sec. 11. The individual's right to privacy in the home is a fundamental freedom protecting the individual from unreasonable governmental interference; however, this fundamental right is not absolute. It is subject to limited but well-established exceptions where the public interest requires that proper authorities may impinge upon the individual's right to privacy. In these

instances of compelling public need, the government bears the burden of proving that the public interest supersedes the individual's right to privacy. Consequently, to insure the validity of a warrantless arrest, the state must prove probable cause, coupled with exigent circumstances. E.g., Dunaway v. New York, 442 U.S. 200 (1979); Henry v. United States, 361 U.S. 98, 102 (1959); State v. Paszek, 50 Wis. 2d 619, 184 N.W.2d 836 (1971); see Payton v. New York, 445 U.S. 573, 575, 583-88 (1980) [citing Laasch v. State, 84 Wis. 2d 587, 267 N.W.2d 278 (1978)].[6]

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[6]Both Payton and Laasch are Fourth Amendment cases, providing fundamental support for our position in the present case. Payton v. New York, 445 U.S. 573 (1980); Laasch v. State, 84 Wis. 2d 587, 267 N.W.2d 278 (1978). Although a cursory reading of Payton suggests that it is unconstitutional for police officers, having probable cause, to enter a private residence without a warrant, it is

This dual finding is subject to numerous and diverse interpretations. The common feature underlying all search and seizure interpretations, however, is the

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clearly distinguishable from the case at bar because, unlike the present case, Payton expressly disavows a finding of exigent circumstances. Payton states that,

"[a]lthough it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. The [New York court] treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant, and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 445 U.S. at 583 (footnote omitted) (emphasis added).

Likewise, the defendant's warrantless arrest in Laasch v. State occurred absent a showing of exigent circumstances. In Laasch, the issue before this Court was "whether, in the absence of any exigent circumstances, a police

reasonableness of the government's intrusion when considered within the context of the totality of the circumstances. See: State v. Cheers, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981); Bies v. State, 76 Wis. 2d 457, 468, 251 N.W.2d 461 (1977). The United States Supreme Court has addressed the concepts suggestive of analysis in determining the reasonableness of the governmnental

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officer may enter a suspect's home without consent in order to make a warrantless arrest." 84 Wis. 2d at 593 (emphasis added). Admittedly of less significance than the absence of exigency, the arresting officers in Laasch were arguably afforded ample time to obtain a warrant, as there was a thirteen-day interval between the defendant's offense and her arrest. Id. at 588-89.

Consequently, the time lapse and the absence of exigent circumstances in both Payton and Laasch limit their applicability to the present case. In this case, we hold that the existence of exigent circumstances contributes to our justification of Welsh's arrest.

interference with the individual's Fourth Amendment rights. "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Brown v. Texas, 443 U.S. 47, 50-51 (1979). Moreover "'[w]hether an inquiry is considered reasonable must depend upon the facts in each case and must turn on the application of what is essentially an indeterminate and flexible test.'" Bies v. State, 76 Wis. 2d at 466 [quoting Browne v. State, 24 Wis. 2d 491, 507 129 N.W.2d 175 (1964)]. Although the State must prove the existence of both probable cause and exigent circumstances, negating any implication of adherence to a mere balancing test, the progeny of

Fourth Amendment case law demonstrates that reasonableness occupies a prominent position in search and seizure analysis. Exigent circumstances and particularly probable cause, are not susceptible to stringently mechanical definitions. Frequently, case law has offered guidance through example rather than by definition. Consequently, the particularities and peculiarities of a given case are considered in the context of reasonableness. Accordingly, thorough analysis seeks to ascertain whether the case, in its entirety, while meeting the dual standards of probable cause and exigency, veritably accommodates this context of reasonableness.

I. PROBABLE CAUSE

The probable cause standard required to arrest dictates that quantum of evidence which would lead a reasonable pol-

ice officer to believe that the defendant probably committed the offense. The evidence must show that there is more than a possibility or suspicion that the defendant committed the offense. The evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. State v. Paszek, 50 Wis. 2d at 624-25.

In State v. Paszek, 50 Wis. 2d at 624-25, we described probable cause as follows:

"Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case. Probable cause is

defined in Draper v. United States, supra, p. 313, as:

"'"In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Carroll v. United States, 267 U.S. 132."'" State v. Paszek, 50 Wis. 2d at 624-25 (citations omitted).

To effectuate a warrantless, nonconsensual entry into the residence, in addition to exigent circumstances the officers had to have probable cause to believe that the defendant had committed the offense of driving while under the influence of an intoxicant at the time they entered the home.

[1]

Examination of the record demonstrates the existence of probable cause, satisfying the first requisite of the

two-pronged test necessary to justify the officer's warrantless entry and arrest of the defendant. In this case, the officer had a substantial amount of reliable information, indicating to a reasonable police officer that the defendant had probably violated the statute prohibiting driving while under the influence of an intoxicant. See sec. 345.22; 346.63(1), Stats. 1977.

[2]

Arriving at the scene of the accident the officer was met by Jablonic, the sole witness to the driver's conduct. There is nothing in the record which challenges the reliability of either his observations or his statements to the officer. Adhering to the standard for reliability established in State v. Cheers, we held

"'"that a valid arrest without a warrant may be made solely by reason of

information communicated by a reliable informant. . . . A citizen who purports to be a victim of or to have witnessed a crime is a reliable informant even though his reliability has not theretofore been proved or tested. . . . The rationale underlying this principle is that such a person, as the observer of criminal activity, acts openly in aid of law enforcement when he reports the crime to the police."'" 102 Wis. 2d at 395-96. (emphasis added) (emphasis in original omitted) [quoting State v. Paszek, 50 Wis. 2d at 631].

Consequently, Jablonic's information satisfies both prongs of the Cheers test for reliability.

In the Cheers case we discussed an additional "'factor to be considered in determining whether probable cause exists,'" namely, that the defendant's "conduct and retreat or 'flight' from the police officers' show of authority immediately prior to the time of his arrest certainly constitutes evidence of consciousness of guilt." State v. Cheers, 102 Wis. 2d at 391. The defendant's statements, as well as his imme-

diate retreat from the scene in fleeing to his home at the mention of police officers, clearly "constitutes evidence of consciousness of guilt" and is an additional factor buttressing our conclusion that the trial court properly found the existence of probable cause.

Jablonic told the officer at the scene of the accident that the officer had arrived "practically immediately upon [the driver's] departure." The officer's license check identified the owner of the vehicle. As we have noted, ownership does not necessarily indicate the driver's identity; however, the officer correctly recalled his involvement in the recent arrest of the owner in an alcohol-related dispute. Jablonic did not give a detailed description to the officer of the driver's physical features, but he did state that the driver was a man wearing wet clothing. This

information, coupled with Jablonic's observations of the defendant's erratic driving patterns and his personal conduct, further supports the trial court's holding of probable cause.

Acting upon his collective knowledge of the situation, the officer proceeded immediately to the defendant's residence and was told that the defendant "had just stumbled in." While the officer, prior to his arrival at the house, had probable cause to believe that the defendant was the driver of the abandoned automobile, the defendant's stepdaughter's statement provided additional evidence in support of the proposition that the defendant was the driver because she said he had stumbled in only moments before the officer had arrived.

The word "stumbled" buttressed the witness's belief that the defendant was intoxicated. The fact that the defen-

dant had just returned home on this rainy night supports the officer's belief that the defendant was the driver of his just abandoned car. The officer believed that he had probable cause, declaring that he "thought [the driver] was probably under the influence of an intoxicant."

Although the defendant contends that the officer proceeded to the residence to determine whether he had sufficient evidence to establish probable cause to enter and arrest the defendant, we do not find this contention persuasive. The officer, acting upon Jablonic's observations, coupled with his own accurate recollection of his involvement in the arrest of the defendant in a recent alcohol-related disturbance, had probable cause when he proceeded to the residence. The officer's conversation with the defendant's stepdaughter before en-

tering the home provided further evidence establishing the existence of probable cause.

Scrutiny of the record, in its entirety, indicates that the officer had probable cause before he entered the defendant's residence. Although the officer may not have been absolutely certain that the defendant was driving while under the influence of an intoxicant, absolute certainty is not the standard employed in determining the existence of probable cause.

The officer's conversation with the defendant's stepdaughter before entering the home provided further evidence establishing the existence of probable cause. The officer testified that,

". . . it was my mental intent to go in the house and determine if he was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my

intent to investigate it up to that point and make a determination."

The defendant argues that this statement demonstrates that the officer did not believe he had probable cause and was going to the defendant's bedroom solely to investigate. The officer's statement, when considered along with his declaration that the defendant "was probably under the influence of an intoxicant," demonstrates that the investigating statement is not being read by the defendant in the context of the entire record. The officer, correctly believing that he had probable cause, merely recognized that he was not absolutely positive that the defendant had been operating his automobile while under the influence of an intoxicant. The defendant could have been drinking after he returned to his home, thereby rendering the results of a blood alcohol

test meaningless. Moreover, if the defendant had been ill, rather than intoxicated, the officer would have changed his original conclusion on which he had predicated the existence of probable cause. Consequently, the officer's statement merely acknowledged that he was not absolutely certain that the defendant was driving while under the influence of an intoxicant, and prior to arresting the defendant, he was willing to reconsider his initial conclusion if necessary. A synthesis of these facts negates the possibility that the officer only had a mere suspicion that the defendant was driving while under the influence of an intoxicant in violation of sec. 346.63(1), Stats. 1977.

The foregoing evidence, when myopically parsed, may not individually support a finding of probable cause. When examined collectively, however, it un-

questionably indicates "that quantum of evidence which would lead a reasonable police oficer to believe that the defendant [driver] probably [violated the statute prohibiting driving while under the influence of an intoxicant]."[7] State v. Cheers, 102 Wis. 2d at 386; see Henry v. United States, supra; secs. 345.22 and 346.63(1), Stats. 1977. The evidence in this case clearly demonstrates that the trial court was correct in ruling that the state had met its burden.

In considering the governmental interest, it is appropriate to note that driving under the influence is a perva-

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[7]Consequently, Welsh meets the probable cause standard articulated in both the majority and dissenting opinions in State v. Cheers, 102 Wis. 2d 367, 386, 306 N.W.2d 676 (1981); Id. at 406, 408 (Abrahamson, J., dissenting).

sive problem of substantial proportion. In Wisconsin in 1981, there was a 5 per cent increase in drunken driving convictions from 1980.[8] Further, approximately 50 percent of all drivers killed in Wisconsin were driving while legally intoxicated.[9] The in-

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[8]Wisconsin Department of Transportation figures show that in 1981 there were 32,506 convictions for drunken driving. Drunken driving statistics covering years prior to 1981 have been published in annual reports entitled, Anderson, Wisconsin Accident Facts (prepared by the Traffic Accident Data Section of the Division of Motor Vehicles, Department of Transportation [hereinafter Wisconsin Accident Facts]).

In Wisconsin in 1980, there were 30,409 convictions for drunken driving. Wisconsin Accident Facts 16-17 (1980).

[9]In 1980, 583 drivers were killed. Of these drivers, 470 were tested for blood alcohol content, and 269 were found to be legally intoxicated, having a minimum blood alcohol content of .10 percent. Wisconsin Accident Facts 1 (1981). Similarly in 1978, 576 drivers were killed; while

creasing number of fatalities caused by drunken drivers has aroused state legislatures to adopt stricter penalties in the forms of substantial fines, imprisonment, and license suspensions to punish those who violate the laws prohibiting driving while under the influence of an intoxicant.[10]

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226 of the 448 tested were found to be legally intoxicated. Wisconsin Accident Facts 1 (1979).

[10]Sec. 967.055, Stats., created by Chapter 20, Laws of 1981, provides:

"Sec. 967.055 Dismissing or amending charges; operating a motor vehicle, intoxicant or controlled substance. (1) INTENT. The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, or a controlled substance or both.

"(2) DISMISSING OR AMENDING CHARGE. Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge under s. 346.63(1) or a local ordinance in conformity therewith, or s. 346.63(2) or 940.25 or s. 940.09 where the offense involved the

II. EXIGENT CIRCUMSTANCES

[3]

In addition to the existence of probable cause, accompanying proof of exigent circumstances must be shown in order to justify this warrantless entry. Proof of exigency vitiates the need for a warrant under those circumstances when obtaining a warrant could frustrate the arrest. An analysis of the facts demonstrates that, in this

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use of a vehicle or an improper refusal under s. 343.305, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant or both."

See Hammer, The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving, 55 Wis. B. Bull. 9 (April, 1982); e.g., sec. 346.63 (1), Stats., repealed and

case, exigent circumstances justified this officer's warrantless entry to effect the arrest of the defendant.

Frequently, proof that the officer is in hot pursuit of the suspect constitutes exigency. The hot pursuit doctrine evolved to encompass situations where time was of the essence. In other words, when requiring the police to obtain a warrant would constitute undue delay, the hot pursuit doctrine is applicable. In this case, time was of the essence. The inherent nature of the offense demanded the suspect's immediate apprehension to accommodate the dictates of the blood alcohol test statute. Sec-

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recreated by Chapter 20, Laws of 1981; sec. 346.65 (2), Stats., repealed and recreated by Chapter 20, Laws of 1981; see also Hammer, The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving, 55 Wis. B. Bull. 15, 17 (May, 1982).

tion 343.305(2)(a), Stats. 1977. In order for the officer to enforce the statutory requisites, the situation demanded his immediate search for and pursuit of the suspect.

The defendant, fearful of the officer's impending arrival and perhaps recognizing the possibility of being requested to submit to a blood alcohol test, left the scene of the accident upon discovering that the officer had been summoned. Fleeing to his home, in an attempt to avoid a confrontation with the officer, the defendant's hasty departure resulted in the abandonment of his car. If the officer had retreated and sought to obtain a warrant, rather than immediately pursuing and arresting the suspect, the requirements of the blood alcohol statutes would have been frustrated.

The imminent threat to safety doc-

trine also constitutes exigent circumstances. The sole purpose of the blood alcohol test is to facilitate prosecution of those driving while under the influence of an intoxicant. See sec. 343.305(2)(a) and 346.63(1), Stats. 1977. Further, sec. 345.24, Stats. 1977, provides that a person arrested for driving while under the influence of an intoxicant "may not be released until four hours have elapsed."[11] This

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[11]Section 345.24, Stats. 1977, provides in its entirety:

""345.24 Officer's action after arrest for driving under influence of intoxicant. A person arrested under s. 346.63 or an ordinance in conformity therewith for operating a motor vehicle while under the influence of an intoxicant may not be released until 4 hours have elapsed from the time of his or her arrest or unless a chemical test administered under s. 343.305(2)(b) shows that there is .05% or less by weight of alcohol in the person's blood, but the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest."

severe treatment is dramatic evidence of the legislature's intent and recognition of the need to protect the public from drunken drivers. Undoubtedly, this provision was enacted to prevent drunken drivers from returning to the road while intoxicated. Presumably, this four-hour statutory limitation sought to provide an adequate time allowance for the arrested intoxicant's blood alcohol content to metabolize to a safer level, equal to or less than .05 percent. Restraining those drivers who pose a danger to themselves and the public for the four-hour statutory period constitutes a preventive measure, designed to promote public safety.

The officer concluded that he had probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant. Accordingly, the situation

demanded the officer's prompt attempt to locate the defendant. An arrest would prevent the driver from returning to his, or another automobile, where he could have continued to drive in his current state, posing a danger to himself and the public. Consequently, the nature of this offense, coupled with the potential threat to the public safety, satisfied the exigent circumstances test pursuant to the imminent threat to safety doctrine.

An equally persuasive argument is the probable destruction of evidence. This is a model case demonstrating the urgency involved in arresting the suspect in order to preserve evidence of the statutory violation. "Sometimes the nature of the evidence will be such that it will soon disappear of its own accord." 2 W. LaFave, Search and Seizure, sec. 6.5 at 448 (1978). "Blood rapidly

metabolizes alcohol after a person ceases drinking; thus creating an exigent situation." State v. Bentley, 92 Wis. 2d 860, 864, 286 N.W.2d 153 (Ct. App. 1979). Without an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the state's proof of the defendant's alleged violation of sec. 346.63(1), Stats. 1977, would be destroyed. See sec. 343.305(2)(a), Stats. 1977. Accordingly, the facts of this case adhere to the presumption favoring warrantless arrests which are a result "of an ongoing investigation in the field," rather than an arrest that had been planned. W. LaFave, supra, sec. 6.1 at 391.[12]

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[12]Professor LaFave, a preeminent authority on the Fourth Amendment, distinguished a finding of exigency in cases involving planned arrests as opposed to those relating to an ongoing

In summary, we conclude that this situation did not afford the officer ample time in which to obtain a warrant. Further, the record demonstrates that the officer's conduct was reasonable within the context of the surrounding circumstances. Accordingly, we affirm the circuit court's holding, finding the existence of both probable cause and exigent circumstances in the present case.

By the Court.--The decision of the court of appeals is reversed.

CECI, J., took no part.

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investigation in the field:

"A 'planned' arrest is one which is made after a criminal investigation has been fully completed at another location and the police make a deliberate decision to go to a certain place, either the arrestee's home or some other premises where he is believed to be, in order to take him into

SHIRLEY S. ABRAHAMSON, J. (dissenting). As a result of the decision in this case, if a witness reports to the police that:

(1) a few moments ago, on this dark, rainy night he saw a car being driven

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custody. . . . Courts have understandably been reluctant to accept police claims of exigent circumstances in these situations, for it ordinarily appears that whatever exigencies thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained." W. LaFave, supra, sec. 6.1 at 391.

"On the other hand, when the occasion for arrest arises while the police are already out in the field investigating the prior or ongoing conduct which is the basis for the arrest, there should be a far greater reluctance to fault the police for not having an arrest warrant. Here, the presumption should be in favor of a warrantless arrest rather than against it, as the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate and obtains a warrant, and then returns with it." Id. at 392 (emphasis added) (footnote omitted).

erratically into a field;

(2) he observed and spoke with the driver of the car but does not know the name of the driver;

(3) the driver staggered and had slurred speech but that the witness had no opportunity to smell any alcohol on the driver's breath;

(4) the driver was either very inebriated or very sick; and

(5) there was no damage to any person or any property;

then the police officers, relying on a statute allowing an officer to arrest a person without a warrant for violating a civil traffic regulation (a civil, not a criminal offense) committed outside his presence, after checking to find that the title to the car is in your name, may, without your consent and without having a search warrant or arrest warrant issued by a judicial officer:

(1) go to your home at night;

(2) enter your home;

(3) climb the stairs to your second-floor bedroom;

(4) look around your bedroom to see if the clothes you took off match the description of the clothes worn by the driver of the car; and

(5) ask you, as you lie naked in your bed, to get out of bed so that the officers can determine whether you are intoxicated.

I dissent because I conclude that this warrantless invasion into your privacy in your home to investigate whether you violated a civil traffic statute contravenes sec. 11, Art. I, of the Wisconsin constitution and the fourth amendment to the federal constitution which guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects

against unreasonable searches and seizures. . . ."

The essence of the fourth amendment is that a judicial officer with the power to issue a warrant, not a policeman or government agent, decides whether the government can enter your home without your consent. As Justice Jackson so eloquently stated:

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." Johnson v. United States, 333 U.S. 10, 14 (1948).

In a free society a warrant provides fourth amendment protection (1) by substituting the judgment of a judicial

officer for that of the police officer; (2) by preventing hindsight from coloring the determination of probable cause; and (3) by providing the person subject to the arrest with assurance that the police officer is acting within lawful authority. United States v. Martinez-Fuerte, 428 U.S. 543, 565-66 (1976). Under our constitution a warrantless arrest is unreasonable except in a few "jealously and carefully drawn" exceptional circumstances. Jones v. United States, 357 U.S. 493, 499 (1958).

In our country a warrantless entry into a home by a police officer is presumed unreasonable, because our society recognizes the special sanctity of the home. In Payton v. New York, 445 U.S. 573, 585-86 (1980), the United States Supreme Court clearly proclaimed that the "'physical entry of the home is the

chief evil against which the wording of the Fourth Amendment is directed,'" and that "it is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." It is only when "exigencies of the situation . . . make warrantless entry imperative" that warrantless entry into a person's home may be condoned. Laasch v. State, 84 Wis. 2d 587, 594, 267 N.W.2d 278 (1978). (Emphasis added.)

I dissent because I conclude that the warrantless intrusion into the defendant's home in the instant case is unconstitutional. First, I have grave doubts as to the constitutionality of sec. 345.22, Stats. 1977, authorizing a warrantless arrest for violation of a civil traffic offense committed outside the officer's presence. Absent sec.

345.22 the officer has no statutory or common law authority to arrest the defendant without a warrant. Second, assuming arguendo that a police officer has authority to arrest the defendant without a warrant for violation of a civil traffic offense committed outside the officer's presence if the officer had reasonable grounds to believe that the person violated a traffic regulation, the facts in this record do not support the majority's conclusion that the officer had probable cause to believe that the defendant committed the civil offense of operating a motor vehicle while intoxicated. Third, the facts do not justify the legal conclusion that the circumstances were exigent, making the warrantless entry into the defendant's home "imperative." Laasch v. State, supra, 84 Wis. 2d at 594.

Arrest for a Civil Offense. In contrast to the cases cited and relied upon by the majority to justify a warrantless entry into the defendant's home, this case does not involve a warrantless arrest for a felony. This case does not involve a warrantless arrest for a misdemeanor. This case does not even involve a warrantless arrest for the violation of a civil traffic statute committed outside the presence of an officer. This case involves a warrantless arrest for the violation of a civil traffic statute committed outside the presence of an officer.

The majority concludes that the officer's power to arrest is predicated on sec. 345.22, Stats. 1977, which states:

"345.22 Authority to arrest without a warrant. A person may be arrest-

ed without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."[1]

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[1]Both the defendant and the state initially treated this case as if the defendant was accused of violating a criminal statute and not a civil statute. The court of appeals decision stated that the case involved a misdemeanor yet there is no proof in the record that the defendant was involved in a crime. A first violation of sec. 346.63(1) is a civil forfeiture; a second or subsequent violation within the statutory time period is a crime. Sec. 346.65(2)(a)1, 2. The state in its briefs referred to the officer's power to arrest under sec. 968.07(1)(d), Stats. 1979-80, the criminal arrest statute. For other arrest provisions see sec. 62.09(13) and ch. 818, Stats. 1979-80.

When the defendant made the point that the offense here is civil, the state agreed that there is no indication that the offense is criminal. The state in its final brief argues that because the defendant did not raise the

Sec. 345.22 is a departure from the common law doctrine of arrest and from the long-standing rules of arrest in Wisconsin. The statute was enacted in 1971. The longstanding Wisconsin rules of arrest allowed an officer to make a warrantless arrest if the officer had probable cause to believe the person was committing or had committed a felony or to believe the person was committing or had committed a misdemeanor or an ordinance violation. The officer could not, however, make a warrantless arrest if the misdemeanor or ordinance violation was not committed

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question of whether the offense here indeed was a crime, that issue has been waived. I conclude that, regardless of the issue of waiver, the validity of sec. 345.22 is an important issue for this case and law enforcement, and we should under our discretionary powers reach it.

in the officer's presence unless other factors existed. Sec. 954.03, Stats. 1967. The common law, in contrast to the Wisconsin law, was more restrictive as to the officer's power to make a warrantless arrest for a misdemeanor. At common law the arrest was permissible only if the misdemeanor was committed in the presence of the officer and constituted a breach of the peace. State v. Smith, 50 Wis. 2d 460, 469, 472, 184 N.W.2d 889 (1971).

The validity of sec. 345.22, which authorizes a warrantless arrest for violation of a civil statute when the violation was committed outside the presence of the officer cannot be assumed. The constitutionality of a warrantless arrest for a felony committed outside the presence of an officer was not settled until 1976, and then by a divided United States Supreme Court.

In United States v. Watson, 423 U.S. 411 (1976), the Court declared constitutional a daytime warrantless arrest in a public place for a felony committed outside the presence of the officer. The Court upheld the warrantless felony arrest in that case, reasoning that such an arrest is based on accepted common law doctrine of arrest and that if felony arrests were permissible only with a warrant or only in exigent circumstances effective criminal law enforcement would be significantly handicapped. The reasoning of the Watson case cannot be applied to uphold sec. 345.22. I cannot find that the common law allowed a warrantless arrest for the violation of a civil statute committed outside the presence of an officer. The police apparently have the authority to issue a traffic citation to a person who violated a traffic

law ordering the person to present himself at court at a certain time. If we conclude that the police officer must get a warrant to arrest such a person, the effective enforcement of the traffic law will not be significantly handicapped and the constitutional protection of the sanctity of the home will be enhanced.

I have found no cases, and the majority cites none, upholding a warrantless arrest, either in a public place or in a home, for a civil traffic offense committed outside the presence of the officer. All the cases and commentary cited by the majority address the question of the validity of an arrest for a violation of a criminal statute. In Camara v. Municipal Court, 387 U.S. 523, 540 (1967), the Court concluded that in the absence of compelling urgency a warrantless administrative pub-

lic health search of a home violates the fourteenth amendment. Neither the defendant nor the state discusses the question of the validity of sec. 345.22. Because the validity of sec. 345.22 is of significance to traffic law enforcement in general, I would ask the parties for further briefing on this question.

At this stage, however, I wish to express my doubts about the constitutionality of sec. 345.22, Stats. 1977, to the extent that it authorizes a warrantless arrest on probable cause for a civil traffic offense committed outside the presence of an officer. Requiring a warrant in civil traffic cases would protect the privacy of the individual guaranteed by the constitution and would not unduly burden law enforcement. If there are exceptions to the warrant requirement in civil traffic

cases, these have to be defined.

Assuming arguendo that the law applicable to warrantless felony arrests can be applied without change to warrantless arrests for civil traffic offenses committed outside the presence of a police officer, I conclude there was no probable cause or exigent circumstances.

Probable Cause. In reviewing the decision of the circuit court as to probable cause, this court will not overturn findings of fact unless against the great weight and clear preponderance of the evidence, but this court will independently examine the record to make its own determination of the legal question, namely, whether the constitutional requirement of probable cause is satisfied.

The circuit court in this case stated its decision from the bench.

The circuit court merely concluded that "the police did have probable cause to believe that the defendant had committed the offense of operating while under the influence." The circuit court did not make any findings of fact, did not make any analysis or summary of the evidence, and did not analyze the legal principles it used to reach its legal conclusion.

There are disputed facts in this case and the credibility of witnesses is at issue. Generally where the circuit court does not expressly make a finding necessary to support its legal conclusion, this court can assume that the circuit court made the finding in the way that supports its decision. Sohns v. Jensen, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960). See also State v. Fillyaw, 104 Wis. 2d 700, 727-28, 312 N.W.2d 795 (1981) (Abrahamson, J.,

concurring). The majority's de novo review of the record must therefore be to determine the legal significance of the facts, not to decide the disputed facts and the credibility of witnesses.

When an arrest is made without a warrant the state bears the burden of proving the existence of probable cause. Leroux v. State, 58 Wis. 2d 671, 682, 207 N.W.2d 589 (1973). In the case at bar a determination by this court of the legal question of probable cause to believe that the defendant was driving while under the influence of an intoxicant turns on three pieces of information known to the officer making the arrest.

The first piece of information is the ownership of the car. This information is relied upon to establish that it is probable that the defendant was the driver of the car. Jablonic did

not describe the driver sufficiently for the officer to be able to identify the defendant as the driver. The officer had to reason that because the defendant was the owner of the car, he was probably the driver.

The second piece of information on which the determination of probable cause turns is that the defendant had been arrested previously in an alcohol-related disturbance. This information is relied upon to establish that the defendant was probably intoxicated. There is no indication in the record as to the nature of the alcohol-related disturbance; as to whom, if anyone, was intoxicated during this alcohol-related disturbance; as to the nature of the offense for which the defendant was previously arrested; whether there was any finding of probable cause for the arrest; or whether

any further civil or criminal proceedings against the defendant resulted from the arrest. The majority opinion says that the officer "did correctly recall" the arrest. (Emphasis added.) Supra, p. 325. See also supra, pp. 331, 332 where the majority states that the officer's recollection was accurate and correct. There is nothing in the record which indicates whether the officer's recollection about the previous arrest of the defendant is correct or incorrect.

I need not reach the question of when a defendant's previous arrest may be relevant and probative in determining probable cause. In the case at bar the officer's testimony as to the defendant's prior arrest is so sketchy and subject to so many interpretations that neither the circuit court nor this court can use the information about the

arrest to help form its independent determination whether the facts in the possession of the officer are as a matter of law sufficient to constitute probable cause.

The third, and most important, and perhaps the only piece of information on which the determination of probable cause turns, is Jablonic's statement to the officer. This information is relied upon to establish that the driver was probably intoxicated. The critical element in determining probable cause in the case at bar is whether the information which Jablonic, a reliable eyewitness, gave the police officer is sufficient to lead a reasonable police officer to believe that the driver was probably driving under the influence of an intoxicant.

Jablonic, the only person available with first-hand information about the

driver and his driving, testified that the driver was walking and speaking with difficulty and that he was either intoxicated or sick. Even though, as he testified, he was familiar with the signs of intoxication, Jablonic had good reason to be uncertain. The weather was bad, and visibility was poor. Further, Jablonic was not able to verify or discard his intoxication theory because he did not have the opportunity to smell any alcohol when the driver spoke to him and asked him for a ride. I acknowledge that the mere fact that an innocent explanation for the driver's conduct, that is, illness, may be imagined is not enough to defeat probable cause. 1 LaFave, Search and Seizure, sec. 3.2(e), pp. 483-84 (1978). But in this case the innocent explanation for the driver's conduct is not imagined; the innocent explanation

is provided by the only witness, and it is provided as a real possibility.[2] The majority, without ex-

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[2]Jablonic's entire testimony as to what he told the police officer concerning the driver's condition is as follows:

"Q. What did you tell the officer? Did you give the officer a description of the individual you had been talking to?

"A. I don't recall that I did at the time. I told him that I felt the man was very inebriated or very sick or not very much in possession of his faculties or ability to perform. And it was my feeling that he had taken off across the field.

"Q. What did you base your opinion on that he was inebriated?

"A. Well, first of all the erratic motion of the car, and then the staggering and slurred speech that he exhibited when he was trying to talk to me.

"Q. You have seen people or persons under the influence of an intoxicant before?

"A. Working at the University, it's a common--very common to see many inebriated people, unfortunately."

Jablonic described the driver as follows:

"Q. Did you notice anything about this person?

"A. They had a kind of a wet

planation and without any basis in the record, characterizes Jablonic's reference to illness as "merely a remote possibility which provided an alternative, more charitable explanation." Supra, p. 325.

The officer's testimony of what Jablonic told him is inconsistent with Jablonic's testimony. The officer testified that Jablonic had a definite

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leather jacket on or something that looked like a reddish-brown jacket, as what I can recall. It was evening. It was raining and wet. It might have been even a sportcoat that was just wet. And they stood by the window of the car, which I rolled down.

"Q. All right, did you have an opportunity to observe the way this person walked?

"A. It was very unsteady and unsure. And--the person that just wasn't very well would walk like that.

"Q. And did you--did this person get close enough to you that you could observe his breath?

"A. No. They remained outside the vehicle. I did roll down the window. I conversed with the person. But there was no opportunity to smell his breath."

opinion that the driver was intoxicated.[3] Other aspects of the officer's testimony, however, indicate that Jablonic had conveyed his uncertainty to the officer as to whether or not the driver was intoxicated. The officer's own testimony indicates that he went to the defendant's residence to investigate the defendant's condition, not to arrest the defendant. Thus in response to the question as to what was the officer's "mental intent, when you went into the house, to have him arrested for drunken driving," the officer answered,

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[3]Officer Daley testified as to his conversation with Jablonic as follows:

"Q. Do you recall whether or not he [Jablonic] said anything about this individual being under the influence?

"A. Yes, he had a definite opinion about that.

"Q. What did he tell you?

"A. He said the man was very obviously intoxicated."

> "Well, it was my mental intent to go in the house and determine if he was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my intent to investigate it up to that point and make a determination."

It was only after making the warrantless entry into the home, observing the defendant "wringing wet," seeing in the bedroom defendant's clothes which matched the clothes Jablonic described and smelling alcohol that the officer himself concluded he had sufficient information to lead him to believe that the defendant probably committed the offense of driving while under the influence of an intoxicant and decided to arrest the defendant.

Although the majority states that the circuit court reached "the conclusion that Jablonic conveyed the defi-

nite impression that the driver was intoxicated" (supra, p. 324), nowhere in the record did the circuit court state such a conclusion or even hint it reached such a conclusion. The circuit court's only reference to Jablonic's testimony is a reference by the circuit court to its notes which quote Jablonic as telling the officer that the driver was either sick or intoxicated. if any conclusion of the circuit might be gleaned from the record as to the circuit court's finding of credibility as to Jablonic's or the officer's version of what Jablonic told the officer, and I do not know that any can be, it is that the circuit court relying on its notes concluded that Jablonic offered two explanations to the police officer for the driver's conduct--intoxication and illness. The most appropriate construction of the record is, however,

that the circuit court concluded that it need not decide which witness to believe because whichever witness it believed the evidence was adequate to establish probable cause.

The majority seeks to bolster its conclusion that the officer had probable cause by relying on the officer's testimony as to what the daughter and the wife said when the officer entered the house. The daughter was not present to testify. The wife, without objection, related the daughter's version of what had happened, and the wife's testimony contradicts the officer's. The circuit court expressly avoided having to determine whose testimony it believed, the wife's or the officer's, and therefore the majority cannot use the officer's disputed testimony to bolster its conclusion.

Although the subjective conclusions

of the police officer concerning the existence of or lack of existence of probable cause do not bind a court, the officer's apparent decision in the case at bar that the eyewitness furnished information sufficient to warrant further investigation but did not furnish information sufficient to lead him to believe that the defendant probably committed the offense of driving while under the influence of an intoxicant has some weight in this court's independent determination of whether the information relayed to the officer was sufficient. Instead of saying that he intended to arrest the defendant but that he would have refrained from making the arrest if he found that the defendant was not intoxicated, the officer concluded on the record that it was his "intent to investigate . . . and make a determination." The major-

ity cannot, try as it will, change the officer's words.

On the basis of the record in this case, I conclude that the state did not present sufficient facts to prove that information in the officer's possession was sufficient to satisfy the constitutional standard of probable cause. I conclude that when the officers entered the residence, they could only suspect that the defendant may have been the driver and that the driver may have been under the influence of an intoxicant. Reasonable suspicion (that is, ample factual justification falling short of what is required to support arrest or search) may be sufficient to justify further investigation, and in some situations, to justify a stop but it is not sufficient to justify a warrantless arrest. Brown v. Texas, 443 U.S. 47, 51 (1979); Terry v. Ohio, 392

U.S. 1, 22 (1968); Wong Sun v. United States, 371 U.S. 471, 479 (1963); State v. Cheers, 102 Wis. 2d 367, 386-87, 306 N.W.2d 676 (1981); Bies v. State, 76 Wis. 2d 457, 465-66, 251 N.W.2d 461 (1977).

The majority opinion, in the section entitled probable cause, discusses the government's interest in eradicating drunk driving. Supra, pp. 333-335. The relevance of this discussion is not readily apparent. First, granting the police the power that the majority does in this case "does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment." Delaware v. Prouse, 440 U.S. 648, 660 (1979). The contribution to highway safety of allowing warrantless arrests in the home of persons who are reported to have driven erratically and who are

described as drunk or sick and who caused no damage to property or person is marginal at best.

Second, if the police officer had probable cause to make the arrest, the government's interest and the seriousness of the offense are irrelevant. If the police officer did not have probable cause to arrest, the arrest is unconstitutional and the government's interest and the relative seriousness of the offense are irrelevant. If the majority's discussion of the government's interest is the majority's way of saying that the seriousness of the offense is a factor for the police and the courts to consider in determining probable cause, the majority is making a dramatic change in the law of probable cause and is establishing a balancing, sliding scale test that would be difficult for both police and courts to

comprehend and apply. 1 LaFave, Search and Seizure, sec. 3.2(a), pp. 450-58 (1978).[4]

Exigent circumstances. Even if there is probable cause to believe the defendant has committed a felony, a warrant is required to enter a home unless exceptional circumstances are

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[4]In determining probable cause there is no balancing or weighing of the gravity of the public concerns served by the arrest and the severity of the interference with individual liberty. The balance has been made by adopting the requirement of probable cause. As the United States Supreme Court has said, "The requisite 'balance' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." Dunaway v. New York, 442 U.S. 200, 214 (1979).

The majority at one and the same time appears to negate and to inject a balancing test in determining probable cause. The majority says at supra, p. 329 that "although the State must prove the existence of both probable cause and exigent circumstances, negating any implication of adherence to a mere

present which justify a warrantless entry. United States v. Johnson, ___ U.S. ___ (June 21, 1982); Payton v. New York, 445 U.S. 573 (1980); Laasch v. State, 84 Wis. 2d 587, 267 N.W.2d 278 (1978). Payton and Laasch, upon which

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balancing test, the progeny of Fourth Amendment case law demonstrates that reasonableness occupies a prominent position in search and seizure analysis." (Emphasis supplied.) The progeny to which the majority refers are Brown v. Texas, 443 U.S. 47, 50-51 (1979), and Bies v. State, 76 Wis. 2d 457, 466, 251 N.W.2d 461 (1976) (quoting Browne v. State, 24 Wis. 2d 491, 507, 129 N.W.2d 175 (1964) cert. denied. 379 U.S. 1004). These cases involve an investigation or a stop which requires something less than probable cause. An investigation and a stop may be justified even if there is no probable cause as long as there is "mere 'reasonable suspicion.'" Dunaway v. New York, 442 U.S. 200, 211 (1979). Reasonableness in the probable cause context revolves around whether the officer has reasonable grounds to believe that the defendant probably committed a crime. Reasonableness in the context of an investigation or stop involves balancing the gravity of the state's interest and the nature of the

the majority relies, are authority only for the proposition that a warrantless arrest in a home may be permissible under exigent circumstances if the officer has probable cause to believe a felony has been committed. These cases are not authority for a rule that a warrantless arrest can be made in a home under exigent circumstances if the crime is a misdemeanor or if the offense is a civil traffic offense. The majority cannot assume that the Payton

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invasion of the privacy of the person. The majority's shifting back and forth between the balancing test justifying an investigation or stop and the concept of probable cause justifying a search or an arrest may very well explain why the majority reaches the conclusion it did in this case that the intrusion in the defendant's home and his arrest were constitutional.

The court of appeals used a balancing test in this case to determine exigency, not to determine probable cause. See note 5 infra.

and Laasch rule is automatically applicable to this case. The issue which must be decided, not assumed, is under what circumstances, if any, is a warrantless entry in a home at night to effect an arrest for violation of a civil statute constitutional? Does the government's interest in enforcing the civil law and collecting a forfeiture ever outweigh an individual's expectation of privacy in his or her home?

Even if I were to assume that the Payton-Laasch rule is automtically applicable to this civil forfeiture case, I conclude the record is not adequate to find exigent circumstances.

The exigent circumstances doctrine, like all exceptions to the warrant requirement, must be viewed as a narrow exception to the protections of the fourth amendment. In McDonald v. United States, 335 U.S. 451, 456

(1948), the Court said: "We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that cause imperative." (Emphasis added.) See also Laasch v. State, quoted supra at page 341 of this dissent.

Although the United States Supreme Court has on several occasions spoken of exigent circumstances, the Court has not clearly defined what are exigent circumstances or established standards to measure the existence of such exigent circumstances. In this case, the circuit court appeared to conclude that the exigency arose out of hot pursuit and the need to preserve evidence of intoxication. The majority, on the other hand, identifies three exigent circumstances, that is, three urgent

circumstances that make resort to the warrant process impracticable: (1) the need to prevent the offender's escape (hot pursuit); (2) the need to prevent physical harm to the offender and the public; and (3) the need to prevent the destruction of evidence.

The majority opinion does not establish standards by which the existence of the exigent circumstances are to be tested. For example, the majority does not explain whether the test for a valid warrantless entry under the exigent circumstances doctrine is a subjective one, an objective one, or both. In State v. Prober, 98 Wis. 2d 345, 365, 297 N.W.2d 1 (1980), the court adopted a two-step analysis (subjective and objective) for application of the emergency doctrine, an exception to the warrant requirement which is similar to the exigent circumstances

doctrine. Under Prober, the warrantless search is invalid unless the officer is actually motivated by the perceived emergency, that is, to render aid or assistance (subjective test). Second, "even though the requisite motivation is found to exist," the warrantless search is invalid unless a "reasonable person under the circumstances would have thought an emergency existed" (objective test).

If the Prober two-step analysis for the emergency doctrine is not applicable to the exigent circumstances doctrine the majority ought to tell us why.

This case cannot meet the Prober subjective test. The officer did not testify that he believed he had to arrest the defendant immediately in order to prevent the defendant from escaping or in order to protect the defendant or the public from the danger of the de-

fendant driving another automobile that night. The officer does refer to the fact that alcohol dissipates with the passage of time. But the officer said that his subjective motivation was to investigate immediately, to determine if the defendant was drunk. The officer did not testify that he believed he had to arrest the defendant immediately to preserve the evidence. He said he went into the house to determine whether the defendant was drunk and if so he would then attempt to preserve the evidence.

This case also cannot meet the Prober objective test of exigent circumstances.[5] The essence of the

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[5]In applying the objective standard, federal and state courts have, according to the commentators, taken one of two approaches in attempting to articulate the facts which bear on the

exigent circumstances doctrine is the degree of urgency to make the arrest or search created by the exigency and the amount of time it would take to obtain a warrant.

The warrantless entry in this case cannot be justified as necessary to

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determination of exigent circumstances: the checklist approach articulated in Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc) or the totality of the circumstances test. See Harbaugh and Faust, "Knock on Any Door"--Home Arrests after Payton and Steagald, 86 Dick. L. Rev. 191, 224-25 (1982); Donnino and Girese, Exigent Circumstances for a Warrantless Home Arrest, 45 Alb. L. Rev. 90 (1980); 2 LaFave, Search and Seizure, sec. 6.1, pp. 388-95 (1978).

Judge Gartzke, writing for the court of appeals, used a balancing test to determine whether the exigency justified the intrusion. He assumed that this case involved a misdemeanor and concluded that although there was urgency to avoid destruction of evidence, the urgency in this case was not sufficiently great to justify a warrantless arrest in the home. He noted that the "misdemeanor" in this case was not a grave offense. The defendant had not

prevent the defendant from escaping arrest or to prevent physical harm to the driver or to the public. The police had the defendant's name and address. There is nothing in the record to indicate that the police thought he would leave the jurisdiction or would not be available for arrest unless he was pursued and arrested immediately. The majority speculates,

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injured any person or property. The defendant's wife and daughter were in no danger. The defendant was in no danger; he was upstairs in bed. An intrusion by the police into a bedroom at night is a serious intrusion on privacy. Entry into the home is ordinarily afforded the most stringent fourth amendment protection. Judge Gartzke's approach of looking at the entire case and balancing the government's need for immediate police action and the defendant's interest in privacy in the home is interesting and worthy of discussion and consideration. It also seems to satisfy the majority's keen interest in balancing and reasonableness. Unfortunately the majority ignores the approach of the court of appeals.

without anything in the record supporting this speculation, that the defendant (whose car was in the field and who, as the police officers found out when they knocked on the door, was in bed) had to be arrested immediately to prevent him from driving another car. The "threat to safety" exception must be limited to situations where the officer has reasonable factual justification to believe the defendant intends to drive again. Without this limitation, in every case involving probable cause to believe that the person was driving under the influence, the police would be justified in making a warrantless entry into the home to arrest the person.

The threatened destruction or removal of evidence presents a more difficult issue of exigent circumstances. It is beyond question that alcohol

"disappears" over a period of time and that the evidence of intoxication will be destroyed by the passage of time. But neither the record nor the majority opinion describes the degree of urgency to make the arrest, that is, how long a time period may elapse before the alcohol has disappeared, and the amount of time it would take to obtain a warrant in the city of Madison at 9:30 at night.

Drugs can be flushed down a toilet in seconds. Money or bloody clothes can be burned within minutes. When we talk about "destruction" of the evidence of intoxication we are talking about hours.

Sec. 345.24, Stats. 1977, indicates that it may take up to four hours to allow an intoxicant's blood alcohol content to metabolize to a "safe" level. Sec. 885.235(3), Stats. 1977, states that chemical tests performed

within two hours of the event to be proved are given prima facie effect without expert testimony; tests performed more than two hours after the event to be proved are admissible as evidence if expert testimony establishes its probative value and prima facie effect. Thus police can perform the test more than two hours after the event and still have acceptable evidence to present in court. In State v. Bentley, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979), a blood sample was taken from the accused three and a half hours after the accident, and the results were apparently damaging to the accused's position. Sec. 885.235(3) was amended in 1982 to provide that samples taken within three hours are given prima facie effect without expert testimony; tests not taken within three hours after the event are admissible

only if expert testimony establishes their probative value and prima facie effect. See ch. 20, sec. 1816(c) and (e), ch. 184, sec. 5, Laws of 1981.

In this case the police zeroed in on the identity of the defendant in about one half hour after the event to be proved. It is up to the state to introduce evidence that resort to the warrant process was impracticable because the warrant and any test for intoxication would come too late. Yet the state introduced no such evidence. Nor are there scientific facts or facts relating to the practice in Dane County as to the issuance of warrants of which this court might take judicial notice to justify the conclusion that a reasonable officer might reasonably have believed that he had to preserve the evidence from destruction and had no time to get a warrant. Because the

state has not met its burden of showing that its warrantless entry was "imperative," I would hold that the circumstances were not exigent.

Accordingly, I would affirm the decision of the court of appeals and remand this case to the circuit court to determine the issue of consent.

To preserve the federal and state constitutional guarantees of the sanctity of the home against the knock on the door in the middle of the night by government officers who do not have a warrant issued by a judicial officer, I dissent.

I am authorized to state that Justice NATHAN S. HEFFERNAN joins this dissent.